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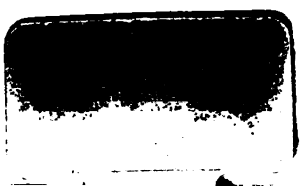

# A TREATISE

ON

# PHARMACAL JURISPRUDENCE

WITH

## A THESIS ON THE LAW IN GENERAL

---

BY

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# PREFACE.

The preparation of this book was suggested by the inconvenience experienced through the want of some treatise, or collection of authorities, on pharmacal law. On receiving his appointment as lecturer in this department of jurisprudence the author found himself upon a path hitherto almost untrodden, and with very little to aid him in his efforts to present the subject in a connected and scientific form.

It was a matter of some surprise that no text-book had yet been produced aiming at a presentation of the principles, with a collection of the leading cases, which define the legal aspects of a profession so important as that of pharmacy.

It is intended that this volume shall occupy a place heretofore vacant in the category of legal text-books, and it is hoped that those who examine its contents will do so with such indulgence as may seem due to the work as a pioneer in its peculiar field.

HARLEY R. WILEY.

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# PHARMACAL JURISPRUDENCE.

## Introductory Thesis on the Law in General.

Before beginning the study of any special branch of jurisprudence, the student will derive benefit from a cursory glance at the broad field of the law in general, of which the subject of this treatise is a small but growing department.

Whether the practicing attorney will be profited or not by these introductory thoughts will depend, in a measure, upon how wide and thorough have been his studies preparatory for his profession; for the lawyer who has acquired his legal education only by desultory and unsystematic reading should find in this brief sketch thoughts deserving his attention.

The growth of any system of jurisprudence is necessarily slow in proportion to its soundness and strength. Society, under primitive conditions, is characterized by savage simplicity as to its legal vestments, and moves in a course of freedom as untrammeled as it is unstable; but, in the usual course of events, it clothes itself in the chaste garments of law and order and thereby attains to conditions of stability.

The beginnings of law among primitive men are, naturally, in the form of simple, home-made usages and customs, observed from time immemorial, by common consent, and at last formally adopted as rules of law to be enforced by whatever there may be of governing power. But these simple rules of action, answering well to the needs of a primitive people are quite insufficient for the requirements of the same people after they have attained to greater refinement and surrounded themselves with the artificial conditions of civilization. Those first crude laws must undergo innumerable modifications and almost infinite expansion, growing more and more complex from generation to generation, in order that they may serve to bind together the vast social fabric of modern times.

Various branches of the human family have attained to national character along independent lines, each developing its own system of jurisprudence. However, the laws of different nations do not present so many points of difference as might be expected. Human nature is about the same the world over, and allowing for differences of climate, occupation, religion, etc., the uniformity in the laws of the civilized world is a matter highly satisfactory to the progressive jurist.

Many things have combined to produce this comparatively uniform state of the laws. The world's great centers of civilization have always

been, to a greater or less degree, in touch with one another; and the comity of nations, commerce, and conquest, have tended constantly toward uniformity of law. Again, some nations have descended from a common ancestry, and, like children reared at the same fireside, have carried with them to maturity many principles and rules of action impressed upon them during the earlier stages of their existence. But far more significant is the fact, that the majority of the various nations from which our commonwealths have sprung, were, at some time in history, brought within the sphere of influence of the vast and over-mastering civilization of the Roman Empire. The latter fact will come before us again in that part of this thesis devoted to the discussion of the English common law and its antecedents, wherein we shall endeavor to present a more concrete and detailed sketch of the law's slow process of development. A brief analysis of American law must first claim our attention.

### American System of Jurisprudence.

It may be a species of arrogance that inspires the citizen of the United States of America to speak of the laws of his country as the "American System of Jurisprudence," apparently unmindful of the fact that this great country, of which we are so justly proud, is but one among a somewhat numerous family of independent

American nations. We may defend the position, however, by the rather doubtful argument that it is customary to thus speak of matters pertaining to the Great Republic.

In speaking of the system of jurisprudence of this country, the term jurisprudence is used in that secondary, and, perhaps, unscientific sense in which it is commonly used to denote the entire body of laws of a certain country as distinguished, collectively, from those in force in other countries.

The time-honored classification of the law, observed by the older writers, into the Written Law and the Unwritten Law, familiar to students as Lex Scripta and Lex non Scripta, is still preserved, and in this country is expressed by the terms statute law and common law. Under the old English classification, the lex non scripta embraced the customs or common law of England, as distinguished from the statutes or laws enacted by the Parliament, which were designated lex scripta.

The written or statute law of America may be best considered in two branches. In the first or federal branch are embraced the Constitution of the United States or fundamental law of the land, the laws passed by the Congress, and all treaties entered into with other countries.

The status and dignity of this branch is defined by the Constitution itself, which declares, by Article VI, that "This Constitution, and the

laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges, in every State, shall be bound thereby, anything in the Constitution and laws of any State to the contrary notwithstanding."

The power of the Congress to make laws is derived wholly from the Constitution, and any act done by that body, in excess of such authority, can have no force as a law.

A bill, the terms of which are unconstitutional, may be passed by both houses, receive the President's signature, and be placed upon the statute books as a law of the land. It may even be enforced by ministerial officers throughout the land and, indeed, be acted upon by the judges of the lower courts. Though such a law bears within itself the fatal taint of unconstitutionality, it must await the time when it shall be applied in the determination of some suit, and, either originally or on appeal, be brought to the consideration of the Supreme Court of the United States. When, however, this supreme tribunal shall have examined the statute, and decided that its provisions are in any sense at variance with the principles of the Constitution, or in excess of the powers of the Congress, it will be deemed absolutely void, and thereafter will receive recognition nowhere as a law.

The American citizen has been rightly taught to look upon the Constitution of the United States as being, in a political sense, the "rock of his salvation." It certainly is the foundation upon which all other foundations in our complex national structures must rest, and it is also the barrier beyond which no daring adventurer in law or statecraft may hope to pass unchallenged. In the vast fields of American legislation and politics much questionable work is done, but the strong fence of the Constitution hems those fields about and insures from destruction the beautiful gardens that Liberty loves to tend.

The Constitution came from The People and can be changed only by The People. It is their potent means of restraint upon both those who make the laws and those who administer them, and by its reassuring presence, he who is troubled during times of political distrust and disturbance is encouraged to rely upon the stability of a government, the vital forces of which are thus ever subject to a restraining hand.

As stated above, the laws of the United States and the treaties thereof are both, equally, parts of the supreme law of the land. Therefore, if a law of the United States, made in pursuance of the Constitution, and a treaty, made under the authority of the United States, are found to be in conflict with each other, since they are of equal force, the one last made must necessarily supersede the other, as being the latest expression of sovereign will.

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The second branch of the written law of this country includes the constitutions of the several States of the Union, and the laws enacted by each State in pursuance of its constitution. Neither the State constitutions nor the State laws are a part of the supreme law of the land; hence, whenever they come into conflict with any law of the character of those embraced in our first division, they must yield to it.

In general, the constitution and laws of each State are of force only within the limits of its own territory. By comity between States, however, which is a sort of international courtesy, one State will apply within its own territory the laws of another State in matters that concern the latter or its citizens. By comity, the corporations of one State are permitted to pursue a lawful business in another State. A marriage, valid in the State where entered into, is valid everywhere. Likewise, a decree of divorce that is valid where granted, is valid everywhere. Actions for injuries to persons or to personal property and actions upon contract may be commenced wherever the defendant can be served with process, regardless of the jurisdiction in which the cause of action arose. On the other hand, it may happen that by one State a right of action is given that other States are not expected to recognize, such as the right to recover a statutory penalty. In the latter case the right to recover is given by statute and can

be enforced only within the jurisdiction where the statute is law. Of the same nature is a statutory right of action given by a State against any person, who, by wrongful act, neglect or default, shall cause the death of another. At the common law, no right of action rose against one for thus causing the death of another; hence, States whose laws do not give such a right, will not enforce it within their territory. Again, all actions to recover land, or for injuries to real estate, are held to be local in their nature, and must be commenced in the jurisdiction where the land is situated.

The examples given above will serve as illustrations of the nature and limits of interstate comity. It may be noted here that this principle, as recognized and acted upon between States, is identical with that which underlies the comity of nations, and is governed by the rules of private international law. It is one of the pleasing products of civilization, tending greatly to lessen the inconvenience which must naturally arise through the conflict of laws enacted by different States possessing sovereign powers.

There are some cases, arising from interstate relations, that the Constitution of the United States has not left to be adjusted by comity, but concerning which positive rules have been laid down. In Article VI it is provided that "Full faith and credit shall be given in each State to the public acts, records, and judicial proceed-

ings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Section 2 of the same article provides that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Concerning the "privileges and immunities" referred to by the last section quoted, Mr. Justice Washington, in Corfield vs. Coryell, 4 Wash. C. C. 371, 380, Fed. Cas. No. 3230, says: "Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole; the right of a citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise, to claim the benefit of the writ of *habeas corpus,* to institute and maintain actions of every kind in the courts of the State, to take, hold, and dispose of property, either real or personal, and an exemption from higher taxes or impositions than are paid by citizens of other States, may be mentioned as some of the principal privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental."

In view of the comprehensive character of the expression "privileges and immunities," it is generally conceded to be safest to leave their meaning open for construction as to each question that may be raised under them and "to be determined in each case upon a view of the particular rights asserted and denied therein." Nevertheless, the enumeration given by Mr. Justice Washington will at least serve to suggest the nature of the questions that may arise under this provision of the Constitution.

This same Section 2 of Article IV provides, also, in its second clause, that "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

We have briefly suggested the outlines of that which constitutes the written or positive law in force within the United States of America. Within their respective jurisdictions, the written or positive laws referred to, as interpreted from time to time by the judiciary, supersede all other laws. The Constitution of the United States is fundamental and paramount, and with the laws passed by the Congress in pursuance thereof, and the treaties made by the authority of the United States, is supreme throughout the entire Union. The constitutions and statutes of

the several States, subject to the supreme law just referred to, are superior to all other laws within their respective jurisdictions.

In its entirety, one could hardly imagine a more complete and imposing structure than appears in this vast aggregation of positive law, having its manifold character, as embracing the distinct systems of many States, made possible and even harmonious by the supreme restraints exercised over the whole by the Constitution, aided by the Congress and interstate comity.

It is to be borne in mind that, within constitutional limits, the Congress, and the legislatures of the several States, respectively, may pass such laws, or, in other words, lay down such rules of action to be enforced within their respective territorial limits, as to them shall seem proper. It is likewise to be remembered that, whenever the law-making power has thus expressed its will in regard to any subject whatever, its mandates must be followed, regardless of what may have been the law before.

It is the duty of the courts to determine whether or not a given statute is constitutional, and also whether or not the case at bar or on trial comes within the provisions of the statute. If the trial court is satisfied that the case under consideration falls within the class intended to be provided for by the statute, its judgment must be rendered in accordance therewith, unless the constitutionality of the law has been suc-

cessfully attacked. But, if the court is satisfied that the case on trial is one not included in the meaning of the statute, there being no other statutory provision covering it, the court must render its decision in accordance with the principles of the common law.

It is proposed now to present to the reader a few facts, explanatory of the sources, growth, and present nature of the great body of legal principles known as the common law. Some idea of the breadth and significance of this great system may be gathered from the fact, that, by its light our constitutions and statutes, both federal and state, have been made and interpreted, and that its wealth of learning must supply rules of decision for every case, outside of statutory laws and the rules of equity, that may arise from all the complex relations of modern civilization, as exemplified in the United States of America.

## THE COMMON LAW.

It is generally said that the United States has no common law, and this statement seems to be justified by the constitutional limits thrown around our federal system. Primarily, the laws of the latter system consist only of the Constitution, the laws enacted by the Congress in pursuance thereof, and the treaties made by the authority of the United States. Possibly the Congress, had it seen fit, might by legislative enactment have made the common law of Eng-

land a part of our federal system, but it has not done so. However, there remains the fact that the Constitution itself, and the treaties and laws referred to were framed by people accustomed to live under the principles of the English common law, and have been applied and interpreted by our judiciary in the light of those principles and in accord with their spirit; so that by this means there has been developed, supplementary to the primary system of federal positive law, a kind of secondary system of federal case law.

In regard to the statement that the United States has no common law, Justice Matthews says: "There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of Constitutional and statutory construction, which, therefore, is gradually formed by the judgments of the Supreme Court in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting upon national authority."

The common law in force in nearly all the States of the Union embraces such of the English common law principles, modified by English statutes enacted before American colonization,

as our ancestors found to be suited to the conditions surrounding them in America.

As was natural, and to some extent necessary as subjects of Great Britain, the men who colonized this country applied to their own needs the principles of that system of law under which they and their forefathers had been accustomed to live; and it can be easily understood that this collection of laws, so complete and so long used by an enlightened people, was capable of supplying most of the rules necessary for use in the affairs of the American colonies.

If the English law failed, at any time, to supply a specific rule suited to the conditions of any case that chanced to arise in the colonies, a general principle could always be found under which the court might formulate a rule applicable to the case at bar. Thus, before the close of the colonial period, by the adoption of such common law rules as were suited to existing conditions and by the application of common law principles as the basis for such other rules as were needed, our country had developed its own system of common law.

It is apparent that though the American and English systems of law are not wholly identical, yet they are intrinsically of the same nature; the former being broadened in some respects, we think, by our newer life and freer institutions.

The State of Louisiana may be noted as a marked exception to the above rule as to the his-

tory and character of the common law of the several States of the Union. Louisiana was a French colony, and the evidences of its colonial nationality are manifest in the nature of its unwritten law at the present day.

Some traces of other national systems are discoverable here and there among the States, but, with these few exceptions, the English common law prevails throughout the Union as the substratum of American Jurisprudence.

Owing to the fact that the principles of the English law have thus descended to us as a sort of heritage, a knowledge of those principles has always been deemed fundamental in the equipment of a liberally educated American citizen, and the *sine qua non* of one who intends to devote himself to the practice of the legal profession.

In order to obtain even a general idea of the nature of the English common law, it is necessary to take into consideration the several elements that have combined to form it. For it is a system that has absorbed into itself the best features of many systems—a fact that led Lord Bacon, at one time, to speak of "our laws becoming as mixed as our language." It is easy to understand that the same general causes have produced both results.

If the ancient Britons, whom the Romans met and mastered before the beginning of the Christian era, had been permitted to remain in un-

disturbed and isolated occupancy of their island, it is impossible to even surmise what would be the character of either the law or the language of England at the present time. Such was not the course of history, however, and during the first eleven hundred years of the Christian era many races struggled for supremacy on English soil. Foremost among them were the Romans, the Picts, the Saxons, the Danes and the Normans, each of whom in a greater or less degree, left abiding traces of its presence and sojourn on that remarkable island.

To what extent the customs of the ancient Britons have contributed to our modern law, it is now impossible to know. The little information that history affords us concerning those people indicates that they had not emerged from a state of barbarism when the Romans, under Julius Cæsar, invaded their island. That great leader himself makes little reference to the manners and customs of the Britons whom he defeated, except such as bore directly upon their military tactics. To him, fresh from his conquest in Gaul, they were only so many more barbarous tribes to be subjugated, or, as he was accustomed to politely express it, "pacified by the Roman arms."

Whatever may have been the laws of the ancient Britons, it does not appear that they were in any material respect modified by the Roman occupation of their island. The Roman influence

in that respect was to be felt many centuries later and long after the great World Empire had ceased to be a living fact.

About the beginning of the fifth century, when their own final trouble and collapse began at home, the Romans recalled their legions from the different quarters of the globe and left the Britons about as they had found them several hundred years before.

During the sixth century, the Saxons, a free and warlike German tribe from the neighborhood of the Baltic sea, succeeded in establishing themselves firmly in the eastern part of England and soon became the dominant race.

The Angles, another tribe similar to the Saxons, quickly followed the latter to the coasts of England, and hence are derived the names "England" and "Anglo Saxon." As the result of the two invasions just referred to, the ancient Britons, probably the ancestors of the Welsh, were pressed back to the western shores of the island.

In the reign of the Saxon king, Alfred the Great, which commenced in the year 871, each of the several Saxon provinces of the kingdom followed its own local customs; and these differed so widely in the different provinces that the king found it necessary to compile what was known as his Dome-Book, a kind of collection or code of laws for general use throughout the realm. Thus it was that the common law of England began to assume definite form and character.

It should be noted at this point, as bearing upon the character of the English common law, that the Saxons were a bold, hardy, and free people, and that their laws partook essentially of the character of the men whom they were formed to govern. And it was this element of rugged freedom that made the Saxon laws so dear to Englishmen; and to maintain them in their purity through the centuries that followed the Norman Conquest, they resolutely opposed the encroachments of tyrannical kings. Doubtless, to the character of the Saxon laws backed by the spirit of a free people, more than to any other one circumstance, the English speaking people of the world owe their long, free history and the enviable freedom of their present institutions—institutions which we are disposed to consider the very best combinations of law and liberty that civilization has yet developed.

King Alfred's code of laws, so carefully selected, was not destined to enjoy an altogether unbroken history. Before the reign of this wise and good king began, the Danes, who were then a rude, sea-faring and piratical race, had commenced their persistent and fierce incursions. With varying success they maintained a bloody war against the brave Saxons, who used every available means to repel them from their shores.

At last these Danish warriors succeeded in establishing themselves on English soil, especially along the eastern coast and in the north.

With them of course they brought their own national customs and usages to add another element to the slowly developing law of England. As a result, within the immediate vicinity of Danish conquest, which embraced a considerable portion of the country, the laws of Alfred very naturally fell into disuse for the time being.

Sir William Blackstone, in his commentaries on the laws of England, speaking of the condition of the laws of that country subsequently to the Danish invasion and establishment, says: "About the beginning of the eleventh century, there were three principal systems of laws prevailing in different districts: 1. The Mercen-Lage, or Mercien laws, which were observed in many of the midland countries, and those bordering on the principality of Wales, the retreat of the ancient Britons; and therefore very probably intermixed with the British or Druidical customs. 2. West-Saxon Lage, or laws of the West-Saxons, which obtained in the countries to the south and west of the island. These were probably much the same with the laws of Alfred above mentioned, being the municipal law of the far more considerable part of his dominions, and particularly including Berkshire, the seat of his peculiar residence. 3. The Dane-Lage, or Danish law, the very name of which speaks its origin and composition. This was principally maintained in the rest of the midland counties, and also on the eastern coast—the parts most ex-

posed to the visits of that piratical people. As for the very northern provinces, they were at that time under a distinct government."

About the time referred to by this eminent jurist, the laws of the kingdom underwent another collection and revision by Edward the Confessor. The seven petty kingdoms of the ancient heptarchy that for a time maintained independent existence prior to Alfred's reign, had long since lost their indentity, and together with the pacified Danish provinces, had merged into the single realm of England. Nevertheless, with all this progress toward political unity, there continued to exist this inconvenient want of uniformity in the laws of the kingdom.

When Edward the Confessor occupied the throne, the laws of King Alfred were still preserved in the South and West, but the system that then prevailed could hardly have been recognized as the simple and free code of Alfred. While undoubtedly it still retained many of the original free principles of the early Saxon laws, they had suffered from contact with the coarser and ruder customs of the Danish race, and the mixture had been still further impaired by the encroachments of several generations of kings.

King Edward, known in history as Edward the Confessor, commenced his reign in the year 1042. This monarch, whose early life was passed in Normandy, among a people more polished than the Saxons were at that time, is credited by

most English historians with having made a digest of the three systems of law referred to above, and having by this means developed a uniform system for use throughout his entire kingdom.

Blackstone is of the opinion that these laws, generally mentioned in histories as the laws of Edward the Confessor, were "no more than a new edition, or fresh promulgation of Alfred's code or dome-book, with such additions and improvements as the experience of a century and a half had suggested."

Whether this last revision or collection of the Saxon laws is deemed to embrace the laws of Alfred, in the form of a new edition, or to be considered a new code prepared by Edward the Confessor, matters little to the present generation. The fact of most interest to us, and, indeed, to all the English speaking world, remains the same in either case; and that is that these laws expressed the free principles of a free people, and were destined to foster a spirit of freedom in whatever land they might be maintained in force.

Such were the laws of England in the year of 1066, when, Edward the Confessor having died, Harold succeeded to the royal power. Then followed the conquest of England by the Normans.

William, Duke of Normandy, styled the Conqueror, claimed to be the rightful successor to the crown of England, landed on the coast with

a gallant army of Norman knights, and there met and defeated the Saxon army in the great battle of Hastings. King Harold died on the battle field, and very shortly afterward Duke William of Normandy was firmly seated on the throne of England.

For many years the Saxons struggled to maintain the laws of Edward the Confessor against encroachments of their Norman conquerors. Their struggles were not altogether fruitless, but, of course, many of the customs of Normandy were forced upon the conquered people.

During the reign of King William, by a general agreement entered into by both Saxons and Normans, what is known in history as the Feudal System was adopted as a part of the law of the realm.

The feudal system is supposed to have begun in the military Policy of the Celtic nations of northern Europe, including Franks, Goths, Huns, Vandals and Lombards. Sir William Blackstone, in his commentaries on the laws of England, claims that these people brought the system with them from their northern homes, when they overran Southern Europe at the decay of the Roman Empire. Ridpath, the historian, and some others maintain that the system is of later origin, and that it had its birth and development among the independent princes and barons of medieval Europe. Whichever theory may be correct, it is certain that this vigorous

plan of organization was in full operation in Europe during the middle ages, and that by virtue of its strength and efficacy in attaining the ends and purposes of government, under the conditions then existing, it grew into almost universal favor throughout the civilized world.

William the Conqueror did not force the feudal system upon his Saxon subjects in England, but the great barons of the realm found that their country was placed at serious disadvantage in the matter of military organization and strength, as compared with their warlike neighbors on the continent of Europe; and this fact, probably more than any other, led to a favorable disposition among the Saxons toward a system that was proving itself to be so effective elsewhere.

It is true that, owing to the fact that many of the Saxon nobles were slaughtered at the battle of Hastings, and during the troubled times attending the complete subjugation of the country, the lands thus left vacant by those killed in battle were apportioned out by the King among his Norman knights and held by them on strictly feudal terms. However, this may be regarded as an incident of conquest, and the fact remains that the feudal system was not generally adopted in England until about twenty years after the battle of Hastings. It was then that the King met the nobles at a place called Sarum, and there entered, formally, into the relation of lord and vassal as prescribed by the rules of the feudal system.

It is not within the scope of the present thesis to present in detail the incidents attending the feudal system, or even the minor points of the system itself, as exemplified in the history of the English law, but for such detailed information the reader is referred to the Commentaries of Blackstone, or to some other treatise of a like comprehensive nature. It will suffice to say in this place that the feudal system is based upon property in land. It is generally believed that when the barbarous tribes of the North overran Southern Europe and settled there, each conquering general divided among his superior officers the lands that he had acquired, to be held by them in exchange for military services. If the general at any time engaged in war, it was the duty of each officer thus holding lands to furnish him with a certain number of men, arms, etc., in proportion to the amount of land held. It was usual for these superior officers to apportion among their subordinate officers the land thus received from their general, and even among some of the most deserving of their common soldiers whom they might wish, especially, to bind to their service.

It is apparent that with society organized on such a plan as that outlined above, it was easy to place an army on a war footing. A solemn obligation, mutual in its character, was entered into by lord and vassal, giver and receiver of land. "Every receiver of land or feudatory, was

therefore bound, when called upon by his benefactor or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewise subordinate to, and under the command of, his immediate benefactor or superior; and so upwards to the prince or general himself; and the several lords were also reciprocally bound, in their respective gradations, to protect the possessions they had given. Thus the feudal connection was established, a proper military subjection was introduced, and an army of feudatories was always ready enlisted, and mutually prepared to muster, not only in defense of each man's several property, but also in defense of the whole, and of every part of this their newly acquired country; the prudence of which constitution was soon sufficiently visible in the strength and spirit with which they maintained their conquests."

The circumstances under which the English people took upon themselves feudal relations were somewhat different, it will be remembered, from those outlined above. In the case of the English, those who already owned the soil, by a general agreement, surrendered their title to the King as lord of the fee; after which they received their lands back by grant from him, thereby becoming his vassals or tenants. The entire kingdom was surveyed at that time and divided into sixty thousands knights fees or grants to be held by as many knights or warriors.

This bloodless revolution gave England a strong military organization, but it also opened the door to the encroachments and abuses of tyranny, and the kings of the Norman line were not slow to avail themselves of the opening. The laws of Alfred and of Edward the Confessor were overridden, while the lords and knights of the kingdom were treated as though they did, in fact, owe everything to their sovereign and held their lands through his generosity, pure and simple. This state of things became intolerable to both Saxon and Norman and culminated in the reign of King John, when at Runnymede, in the year 1215, they forced that infamous coward and tyrant to restore to them their ancient liberties. This was done by compelling the King to sign that most celebrated, probably, of all legal documents, *Magna Charta.*

This great Charter, signed by King John, was nothing more nor less than a written list or charter of those rights which these good subjects of His Majesty deemed themselves entitled to enjoy as free Englishmen. Many of the principles of that celebrated document are reiterated in the Constitution of these United States of America. Notably, the Twenty-ninth Chapter, guaranteeing trial by jury, provides that life, liberty and property shall be forfeited only by judgment of the subject's peers or by the law of the land, and that justice and right are not to be sold, denied, or deferred.

With the Great Charter, England recovered and enlarged the liberties enjoyed before the Norman conquest, under the laws of Edward the Confessor.

When the American colonists declared their independence of Great Britain and finally established the same, the feudal relation was absolutely severed, the Crown lost all claim upon colonial lands, and each of the thirteen colonies became the absolute owner of the territory that it occupied.

Each of the American colonies or States sold her lands for the best price she could get, and, for a stated pecuniary consideration, gave an absolute title by deed or patent, in which there is written no stipulation for fealty, escheat, rent-service or other feudal consideration. Touching this point, in the Pennsylvania case, Wallace vs. Harmstad, the Court says, "The State is the lord paramount as to no man's land. When any of it is wanted for public purposes, the State, in virtue of her political sovereignty, takes it, but she compels herself, or those who claim under her, to make full compensation to the owner."

The power of the State to take private property for public use, referred to in the last paragraph, is termed the right of eminent domain, and is an adjunct of sovereignty. This right is based upon political necessity, and it has no relation to the feudal principle that the sovereign is the owner of the land. The right of eminent

domain may be exercised by a State, and also by the United States as to private property within the limits of its own territory.

Little remains to us now of the feudal system, great and far-reaching as once it was, except a few words and forms out of which the spirit and meaning have passed, but there still exists the necessity for knowing something of its nature in order to understand the law as it now is.

## Roman Civil Law.

Another great formative element of modern jurisprudence, deserving careful thought, is the Roman Civil Law.

This body of laws, as it has come down to us, was collected and compiled about the year 523 by the lawyer Tribonian, and his assistants, under the commands of the Emperor Justinian, who then ruled what is known in history as the Eastern Empire.

From the vast accumulation of more than a thousand years, Tribonian and his associates selected, digested, and arranged for convenient use the legal precepts and principles developed during the entire political history of Rome, both republican and imperial.

This body of Roman law, or *corpus juris civilis,* thus digested, was published during the reign of Justinian, but under later emperors fell into disuse and was lost sight of until the twelfth century, when a copy of the digests was found at

the Italian city of Amalfi. These digests, or pandects, consisted of fifty books and contained a methodical arrangement of "the opinions and writings of eminent lawyers," whose voices, raised in that old classic forum during the centuries when "The Eternal City," by the right of unmatched intelligence and power, filled the proud position of Queen of a world, were listened to with the respect ever accorded to those who speak with authority.

The finding of this copy of the Justinian or Tribonian digests of the Roman law produced a marked revival of interest in their study. The principles that before may have seemed vague and traditional as to meaning and origin were at last presented to the world again in clear and authoritative text. As a result, the system was soon adopted by several of the European nations, yet it is only in these days of complex civilization and great commonwealths that the learning and genius of the civil law have been appreciated fully.

This extensive field of legal learning was, probably, not unknown in England in the days of the Norman Conquest, but was more generally studied and understood in later times. The meeting of these two great systems of law, the early English and the Roman, may be compared to the meeting of two vast rivers. The former, issuing from mountain fastnesses, is irregular but broad in outline, strong, turbid, and whitened by many

a reef and waterfall; and the bold contour of its shores, unworn by population, marks a channel wide and deep enough to bear the united rivers of a world. While the latter sweeps in from vast and fertile valleys, o'er-shadowed by the silent majesty of dead empires; its banks, wherein every point has been worn to a curve of grace, and every reef chiseled to absolute smoothness, gleam with the polish of a thousand years. Chaste, even severe, in the utter refinement of its outlines, it is silent, smooth, and clear, yet pregnant with suggestions of thrilling depths and irresistible force.

Just as the contemplation of classic models has tended toward the elevation and refinement of modern art, and as the study of the ancient models of literature, in the Greek and Latin languages, has polished, refined, and elevated the standards of literature in all modern languages, so has the study of the laws of ancient Rome added strength and luster to the jurisprudence of modern times. Nor is this fact surprising, when we take into consideration that for seven hundred years, commencing with the close of Grecian supremacy in the third century before Christ, and extending to the time when the northern barbarians became masters of the decaying empire, in the fifth century of the Christian era, all that the world possessed of learning and refinement was centered in Rome, its capital and metropolis.

The nineteenth century looks back two thou-

sand years for its masters in art and literature. In the matter of inventive genius, and along the lines of scientific research, no man need doubt that we have passed the high-tide mark of the classic age; but, in delicate accuracy of execution and expression we bow to the attainments of that older civilization, and do not hesitate to borrow from it our ultimate thought in the simple and sublime.

As it is in art and literature, so it is in the law. It is beyond doubt that we have passed the Romans in the strength and flexibility of our political institutions, the attainment of social equality on stable principles, and in all things that tend to insure to the individual the widest possible range of lawful liberty. Also, we enjoy the advantage of feeling that our system of law guarantees our liberties, by insuring to us the power, within ourselves, to maintain those liberties. And yet, with all this, we owe an incalculable debt to that other and ancient republic, the commonwealth of Rome, and to the empire into which that republic merged, for the accuracy, finish, and tried simplicity of the legal principles that have contributed so much to make all these things possible to us.

During the dark ages that followed the wreck of Roman civilization, classic art, literature and law, alike lay for centuries unnoticed and unthought of, while warring tribes and nations stormed over them from sea to sea. With the

breaking up of that ancient civilization, society seemed returning to primeval chaos. The fiery descendants of Goth, Hun, Vandal and Lombard raged over Europe and fought like hungry tigers for lands that had once been the abiding places of culture and refinement. Civilization was drowned in a deluge of barbarism. Floating and tossed about on the waves of that deluge, the records of the highest achievements that the thought and experience of the world had yet attained were only as driftwood in the eyes that remained to view them. The appeals of beauty, elegance, and learning met alike with no response from the iron men of that terrific social cataclysm.

During those centuries of intellectual darkness, and until the revival of learning in modern times, there was no nation or people at any place on the entire earth capable of using and appreciating either the art, the literature, or the laws of Rome. It is true that the Eastern Empire, the Greek branch of the Roman world with its capital at Constantinople, may be regarded as an exception, but of doubtful character, to the statement just made, since it maintained for some centuries the semblance of Roman civilization after the fall of Rome. However, its life was a mere feeble old age, and there existed in its people neither the ambition nor the power to impress Roman ideas or customs upon the rude tribes around them.

Though, in appearance, the learning of classical Rome was destroyed and lost to the world, it was not so in fact. It was like a forest fire when struck by a cyclone. At first the flames seem to have been extinguished, but, in fact, they have only been scattered. The prolific embers, whirled away by the wind, have kindled on a hundred hillsides, and after an interval of smoke and confusion there are a hundred fires instead of only one. It is no longer a local blaze, but the whole vast wilderness is in flames.

Classic Latin has enriched the speech of all the civilized world, as classic learning has enriched its thought. The church of Rome, active and aggressive throughout all the Middle Ages, was undoubtedly the chief agent in disseminating, among the fragmentary nations of that time, the heritage left by the deceased empire. It is through this subtile and powerful agency that we may trace the advent of the Roman civil law to the shores of England. The representatives of that great spiritual organization were everywhere, and constituted, for centuries, the only learned body of men that the world possessed. In England the church had its tribunals, called ecclesiastical courts, for the trial of many causes over which it claimed and was allowed jurisdiction, and in those tribunals the rules of the civil law prevailed. Likewise, in all English military and admiralty courts and in the courts of the two great universities, the civil law was used.

Some of the great English commentators have seemed but little disposed to admit that the English common law owes any appreciable debt to the Roman civil law. It may be truthfully said, however, that many things in the law as it now is, in both England and America, tend strongly to prove, not only that such a debt exists, but, also, that it is of vast proportions.

To what extent the study of this finished legal system of Rome, by both bench and bar, influenced the interpretation of the early Saxon laws in the common law courts, it is impossible to know, nor can we more than conjecture as to the influence of the same line of study on the minds of those who framed the early English statutes. We may at least hazard the opinion that during those earlier centuries, students of the law possessing scholarly instincts were no more disposed to refrain from applying themselves to this great source of learning than they are at the present time.

From this brief discussion of the sources of the English common law, it appears that when it was brought over to America by our ancestors it was a fusion of the surviving principles of three distinct and important systems, i. e.: The ancient Saxon customs as modified by later English statutes, the feudal system of the Middle Ages, and the Roman Civil Law. It appears also, that the customs of the ancient Britons, the Danes, and the Normans are in evidence as minor contributions to the general fund.

We have observed that the feudal system, with a barbaric strength peculiar to itself, overrode the civil law during the ruder centuries intervening between the downfall of the Roman Empire and the revival of learning in modern times. We have seen the force and vitality of the Roman civil law manifest themselves by surviving the death of feudalism, and responding to the needs of a civilization two thousand years later than that by which its principles were developed. We have seen, also, that the early Saxon customs served as a strong framework of law, capable of absorbing and applying to its substantial adornment the serviceable principles of the two other great systems, while yet maintaining its own original free elements and identity.

The common law, as we now find it, may be compared to a sturdy oak tree. Its trunk and first great branches are Saxon. Many important smaller branches have been grafted in by English and American statutes. The classic Roman element appears in the glossy leaves, the unity of parts, and the symmetry of outline. Lastly, the presence of feudalism may be traced in the peculiar forms presented in some of the older branches; but most clearly in the knots and cicatrices that mark where strong limbs have been lopped away. In the days of Alfred, this great tree was but a shrub, well pruned and cultivated by that wise king. The immense size that it has since developed, without loss of either

vigor or symmetry, proves how well its nature is adapted to the atmosphere of a great civilization.

The possibilities for the growth and expansion of the law in the future are bounded only by the limits of civilization itself, and until the latter shall have reached its utmost growth, the law, in the process of its application to cases, will continue to expand to meet the needs of every possible condition of society. New branches of jurisprudence, growing out of legal questions and conditions, developed by the advent of new industries and professions, are claiming the attention of the lawyer, the judge and the writer; and still other new branches must follow as the inevitable result of progress.

The rapid growth of the law, referred to above, seems to point to a more and more complex condition of legal science; yet we think, paradoxical as it may sound, that its real trend is toward simplicity. It is true that the number of specific rules is increasing, but, on the other hand, the tendency of these rules to group themselves under certain great generic principles is becoming each year more apparent; and we think that the latter fact more than offsets the former.

While it may be assumed that the law intends equal justice to all, it is manifestly impossible to make a separate rule to meet the case of each individual; and sometimes, owing to peculiar circumstances, hardship and injustice result from the application of the general rule to a spe-

cific case. Thus, for example, under the common law, if Smith sells to Jones a tract of land, the former holds the legal title until a deed is executed by him and delivered to the latter. Now, if Smith refuses to make the deed, there is no power in the law to compel him to do it. Jones' remedy at common law is simply an action on the contract for the recovery of damages (assuming, of course, that the contract has been so executed as to be binding). But, even supposing that the case is one in which Jones may recover damages by law, this is not an adequate remedy, since he is entitled to have the land itself, and this the law cannot give him. The law intends that which is right, in its general rules as to what shall be required to constitute a conveyance of real property, but it so happens that, in the case under consideration, the application of those general rules leaves Jones smarting under a wrong for which the law affords him no adequate remedy. As another illustration, suppose that a guardian taking advantage af the confidential relations existing between himself and his ward, purchases from the ward, on the very next day after he has attained his legal majority, a valuable tract of land or other property at an unreasonably low price. Under the rules of the common law, the title would irrevocably pass to the guardian, and the ward would be compelled to bear the loss resulting from his inexperience and the betrayal of his confidence. Again, under the common law,

if A owed a sum of money to B, and B assigned or transferred his claim to C, the last could not maintain an action against A for the collection of the debt. The common law did not recognize any legal title in C to the money thus owed by A to B, on the theory that it would be wrongfully encouraging litigation to permit C to prosecute a suit on such a claim.

There are many cases in which the rules of the common law can afford no remedy whatever, and many others in which the remedy provided is neither speedy nor adequate. A rule of law is, in its very nature, inflexible, making it impossible to modify it so as to meet unusual conditions; and this quality of inflexibility must sometimes cause the law, however wisely framed, to work injury where only good was contemplated.

During the earlier history of England, relief from the hardships referred to as resulting from the defects of the law, was sought through direct appeal to the sovereign, with more or less but uncertain effect. The special remedies thus administered by the sovereign were the beginnings of that great department of jurisprudence afterward known as equity, to the consideration of which the attention of the reader is now asked.

## EQUITY.

It may be said that equity, considered in its relation to the common law, has never been satisfactorily defined. The difficulty which attends

every attempt to shape a scientific definition of equity arises partly from the nature of the subject itself, and partly from the arbitrary restrictions which have been placed upon it in the practice of equity courts. Its principles, in the abstract, are as broad and comprehensive as those of simple right; while the restrictions, which hem them about in practice, are so numerous and diversified that they seem to defy every effort to throw around them the limitations of a true and sufficient definition.

Equity, in its general use, is said to mean "the quality of being equal or fair;" "fairness or impartiality exercised in any and all relations and circumstances;" "equality of rights;" "equal justice," etc. While in its relation to the law equity has been defined as, "the system of collateral or supplemental law administered by courts of equity." Professor Bispham, whose recent treatise on this department of jurisprudence has been well received by the legal profession, says: "Equity is that system of justice which was administered by the High Court of Chancery in England in the exercise of its extraordinary jurisdiction." He says further: "This definition is rather suggestive than precise and invites inquiry rather than answers it. But this must necessarily be so."

It is held by many able jurists that any attempt, in a definition, to express the nature of equity as a department of jurisprudence, beyond

what may be implied in the definitions given above, must prove to be misleading. Certain it is that these definitions leave us quite in the dark as to the nature of the subject intended to be defined, and utterly fail to distinguish its principles from those of the law in general.

The last of the great trio of Greek philosophers —Socrates, Plato and Aristotle—over three hundred years before the beginning of the Christian era, gave to the world a definition of equity that has served for over two thousand years as a basis for what we believe to be the best definitions of that department of jurisprudence. Aristotle defined equity as "the correction of the law, wherein it is defective by reason of its universality." We believe that the consensus of opinion as to this definition is that it is true but insufficient. It certainly suggests the real nature of the subject and also the reasons that led to the establishing of the High Court of Chancery in England. It lacks, however, the limiting words necessary to restrict the exercise of this corrective principle to that peculiar system of principles and rules which was actually developed by the above-named court in the exercise of its extraordinary functions, and which has served to define the jurisdiction and principles of modern equity practice in both England and America.

The fact seems to be that the "system of justice," called equity, that grew up in the High Court of Chancery through the practice and ex-

perience of centuries, became in time so strong and complete in itself as to establish a distinct identity, quite independent of the original or general meaning of the word. In other words, while preserving something of its original sense, it has so far overruled that original sense as to give to the word, in its relation to jurisprudence, a new meaning. It may be doubted that the conditions just stated should be deemed sufficient to justify a definition that entirely ignores the nature of the thing defined, and recommends to the inquirer the pursuit of a legal education in the study of chancery practice, as an answer to his question. Such a doubt would not be unnatural and would very reasonably lead to the suggestion that some modification of the definition given by Aristotle might be so combined with one in the nature of that given by Professor Bispham, as to convey in a few words at least some glimmering of the present meaning of equity.

For the purposes of this thesis, we shall consider equity as that system of jurisprudence which has for its object the correction and reasonable interpretation of the law, within the limits observed by the High Court of Chancery of England and modern courts of equity; and it embraces such other features of the administration of justice as have been committed to the jurisdiction of those courts.

Since the jurisdiction, (that is, the power to hear and determine causes,) and the procedure

of the High Court of Chancery of England have determined to a great extent the limits and character of modern equity practice, it will be proper to present here a brief statement as to the growth and power of that august tribunal.

The great civilizations of antiquity felt the need of equity to mend the defects and soften the rigors of the law. The Greeks were familiar with its principles, as evidenced by the scholarly definition of Aristotle. The Romans developed an extensive and highly finished system of equity jurisprudence which, doubtless, contributed greatly to the formation of the English system. Concerning the latter, Bispham says: "The Chancellor, moreover, was generally an ecclesiastic; and to the churchmen, in those days, the learning of the civil law, to which the common law is so much indebted, was principally confined."

Before the establishment of an equity court in England this extraordinary jurisdiction or power was in the king and his council. And when a man was suffering from a wrong for which the law courts could afford no remedy, he sought relief by petition to the king. For instance, if he desired to have a defective deed or other instrument reformed, a real interest in property protected against him who held the legal title, a fraudulent conveyance set aside, or relief from an accident or mistake, there being no help in the law in such cases, his only hope was that the

king and his council, upon hearing his case and being satisfied that the law afforded no remedy, would, as a matter of favor, not of right, see that justice was given him. Down to the present time, in equity practice, the complaint or bill ends with a prayer for relief, and not a demand for judgment as in courts of law.

These petitions for royal favor and interference on behalf of unfortunate subjects of the king, grew more numerous with the passing years and in process of time became burdensome. For this reason the king, in his turn, sought relief by passing these onerous duties over to his chancellor.

The office of chancellor existed under the emperors of Rome, and, presumably in deference to the customs of the Great Empire, was instituted and maintained by most nations of Europe as well as by England. In the latter country the chancellor is a member of the king's privy council, the keeper of the great seal and, probably, the most important personage in the kingdom outside of the royal family.

In the manner stated above it is believed that the chancellors of England first acquired their judicial character; and that, in its way, began the history and high functions of that great equity tribunal, known throughout the world as the High Court of Chancery of England.

From the foregoing statement as to the origin of English equity practice, it may be gathered

that, before an equity court existed in England, many cases arose in which the common law courts were unable to administer justice; that persons seeking relief in such cases were under the necessity of appealing to the king, as the only one possessing the requisite power to help them; and that relief was granted in such cases only as were outside of the power or jurisdiction of the courts of the law.

The facts stated in the last paragraph indicate the general nature of equity jurisprudence as it existed in England in its earlier stages of development; and they fairly illustrate the workings of its underlying principle as we find it expressed in Aristotle's definition.

When, with the advance of time, the High Court of Chancery became more formal and settled in its practice as a regular tribunal of justice, the chancellor began to follow precedents more closely than was done at the beginning. In fact, there grew up among these equity judges the same custom which has always prevailed in the law courts, of each following the decisions of his predecessors, wherever the case under consideration had a precedent in the records of the court. Also, rules of practice and procedure began to accumulate, until, at length the limits of equity jurisdiction and practice became as firmly established and as clearly defined as were those that surrounded the jurisdiction and practice of the common law courts; and the legal machinery

set in motion by the former became even more complex, cumbersome and slow than that attending the exercise of the latter.

In later times, many statutes were enacted by the Parliament amendatory of the common law; and in those cases thus provided for by positive law, there no longer existed the natural and original reason for invoking the extraordinary powers of a court of equity. Yet, such cases continued to be the subjects of equity jurisdiction, and were still heard in chancery, because of the historical reason that they were embraced within the established jurisdiction of that court. Precedent proved to be stronger than reason in this instance, giving life to the rule after the reason of it had ceased to exist.

On the fifth day of August, 1873, Great Britain made a sweeping and radical change in the constitution of her courts. On that day an act of Parliament was passed, entitled "Supreme Court of Judicature Act," to take effect on the second day of November, 1874. This act provided for the consolidation of the Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court of Divorce and Matrimonial Causes and the London Court of Bankruptcy into one Supreme Court of Judicature. By this one act of revolutionary significance the slow growth of a thousand years was completely remodeled in its

outward form, while preserving intact the majestic principles developed by the learning and wisdom of a long line of illustrious judges.

The Supreme Court of Judicature was so constituted that it embraced a High Court of Justice and a Court of Appeals; and the act specifically provided for the recognition of equitable rights and titles by these two branches of the Court, and for the substantial application of equitable remedies. It was a change of form and not a change of principles. The conclusion had been reached that one court might be constituted so as to administer justice in accordance with either common law or equity principles.

Throughout the United States the federal courts deal with both law and equity, as provided in the Constitution, but a distinct form of action is maintained for each, and equitable relief will not be granted in a common law action. In the State Courts the practice is not uniform on this point. New Jersey, Kentucky, Delaware, Tennessee, Mississippi and Alabama, respectively, maintain distinct courts of chancery; while all distinction between actions at law and suits in equity has been abolished in New York, Ohio, Indiana, California, Wisconsin, Minnesota, Missouri, South Carolina, Kansas, and Nebraska. In the other States the two forms of action are still maintained, but, as in the federal system, both are prosecuted in the same court.

It appears from the course of history and from present indications, that the jurisprudence of the future will accomplish the complete assimilation of the doctrines of the two great systems of the past, and that equity powers will be universally exercised by courts of law.

## International Law.

Sir William Blackstone defined the Law of Nations or International Law as "The law which regulates the conduct and mutual intercourse of independent states with each other by reason and natural justice."

This definition seems to imply a kind of equity system, with an unlimited range for the exercise of individual opinion, in each particular case, as to what may be within the limits of "reason and natural justice." But if International Law were thus, in fact, without more definite limitations, two or more independent nations, swayed by opposing interests, would rarely reach an agreement on even the most ordinary lines of intercourse.

The Law of Nations, as now recognized by the civilized independent states of the world, embraces a body of distinct rules and precedents; and abstract reason and natural justice are not usually appealed to in a controversy between nations, except in the absence of an established rule or principle.

Mr. Lawrence, in his text book on International Law, defines it as "the rules which determine the conduct of the general body of civilized states in their dealings with one another." This definition seems to be justified by the practice of modern nations in the settlement of their controversies.

Law of nations must not be confused with comity of nations. One nation has the right to demand of another a due observance of an established rule of International Law, but the exercise of comity is a matter of courtesy and mutual convenience, and is wholly within the discretion of each sovereign state.

International Law has for its sources the writings of great publicists, decisions of prize courts, international conferences, arbitral tribunals, treaties and other state papers, and instruments given by states for the guidance of their own officers and tribunals.

It must not be understood that a mere theoretical rule advanced by a writer, however great his learning and reputation, is a law of nations. Such a rule may present a sound principle, but it is not a law until it has been accepted as such or acted upon by the nations themselves. For instance, many of the humane practices now uniformly observed by nations at war with each other, were first advocated for international use by the great publicist, Grotius. But when these rules first appeared in his writings they had

merely the weight of wise suggestions and sound principles; now, having been accepted by at least most and probably all civilized nations, they possess the authoritative character of law.

The question is often raised as to whether these international rules which determine the conduct of civilized nations in their dealings with one another are really laws. Those who raise the question claim that such rules do not possess the three elements necessary to constitute a law; that is, that they do not embody the command from a superior being, the obligation to obey resting upon those who receive the command, and the sanction or penalty by which obedience is enforced.

It is only by a technical criticism of international rules that the objector to their character as laws can find any support for his objection. When more broadly viewed and fairly analyzed these rules disclose all of the elements necessary to constitute a law; and the same principles are found to exist in them as exist in those rules of action that are prescribed by the supreme power of a single state.

Whenever a rule of action has been accepted by the nations as a proper rule by which to determine their conduct in their dealings with one another, it is, in a sense, mandatory in its application to each of them, and there rests upon each of them the obligation to obey it. As for the sanction or penalty, the nation that persists

in the violation of the rules of International Law is certain to bring upon itself the disapproval of all other nations and will probably provoke the open hostility of one or more. In fact, the disadvantages and losses reaped by such a course constitute a penalty of greater or less significance, the contemplation of which is about as effective in promoting among nations an observance of International Law as the fear of punishment is in restraining the individual citizen of a single state from the commission of crime.

Closely related to the Law of Nations stands what is generally termed Private International Law or Conflict of Laws. These terms are applied to that system of rules or principles which serve to direct the courts of any independent state in the adjudication of those cases which contain some foreign element, either as to the subject matter thereof or the parties thereto, and wherein the jurisdiction or the laws of some other independent state conflict with its own.

In every case at law or in equity which embraces any foreign element, the court must first decide whether it has jurisdiction of the subject matter and the parties; that is, whether it has the right to try the case at all. If, by applying the rules of Private International Law in force within its own territory, it finds that it has the right to hear and adjudicate the cause, then it must next decide, by the same system of

rules, by what body of laws the rights of the parties shall be determined. If, for instance, the controversy involves the construction of the terms of a contract, and it appears that the parties to the contract intended that its terms should be governed by the law of Italy, then the trial court would, generally, under the American rule, be bound to apply the laws of Italy to the interpretation of the instrument. Having settled the meaning of the contract by the laws of Italy, the court would then apply the laws in force within its own jurisdiction to determine whatever related to its performance and operation.

The rules of Private International Law adopted, respectively, by the different civilized nations, while not exactly the same in each state, are yet so nearly the same as to bring the policy of the several nations very near to uniformity in this respect. The explanation of this is in the fact that the several communities are moved, practically, by the same reasons and necessities in this matter, and naturally adopt about the same rules as the most effectual and convenient measures to meet the demand.

This branch of jurisprudence differs in character from public International Law, in being framed, published, and enforced by each state as a part of its own peculiar system of laws; and is international only in the sense of providing for the extra-territorial application of law.

Private International Law is of comparatively modern origin and owes its existence to principles of justice, convenience, and comity. There is a large and important class of cases which it would be impossible for our courts to deal with, and do justice to the parties, without applying this system of rules. Foremost in this class of litigation are questions arising out of marriage, divorce, domicil, administration of the estates of deceased persons, bankruptcy, torts and contracts.

For an acquaintance with the specific rules applied by our courts in the adjudication of cases involving foreign elements, the reader is referred to either "Wharton's Conflict of Laws" or "Dicey on the Conflict of Laws." The former is an American work; the latter is written from an English view of the subject, but is supplemented by able and exhaustive American notes.

# PHARMACAL JURISPRUDENCE.

## CHAPTER I.

### Definitions and Scope of the Subject.

In entering upon the study of any subject, especially if it pertains to a field of learning that is comparatively new to him who is about to explore it, great care should be directed to acquiring a reasonably exact knowledge of the meaning of its more important and peculiar terms. By a due regard for this preliminary but vital feature of his labor, the learner will experience less difficulty than would otherwise be his in mastering the principles of the science to which he is devoting his time and energy.

Pursuant to the thought just stated, this chapter is given to the discussion and definition of a few primary terms, a knowledge of which is deemed to be almost indispensable to a fair understanding of the work in hand.

Blackstone defines law as "a rule of action dictated by a superior being."[1] This definition is very broad and general in its terms and includes about every possible kind of rule within the range of human knowledge. It does not, however, include what are commonly termed

[1] Blackstone Commentaries, page 38.

"the laws of nature," and ought not to do so, for the simple reason that the latter are truths or principles rather than laws, strictly speaking. It is true, however, that authority somewhat arbitrarily supports this illogical application of the word law to an accepted truth of science, and compels us to recognize the fact that it has this distinct and peculiar use as synonymous with principle.

The definition of law given above should be understood as limiting the word in its application to things pertaining to, or in the nature of, the science of government; and as a further limitation, when referring to the laws of any particular state or nation and excluding all rules not embraced in the political sense of the word, the term "municipal" is prefixed, and municipal law is defined as "a rule of civil conduct prescribed by the supreme power of a state, commanding what is right and prohibiting what is wrong."[1]

It seems necessary to the existence of a law that there shall be some superior being or power capable of dictating or prescribing a rule of action. It is, however, unimportant, whether the superior power is lodged in an individual, a group of individuals, or, as in the case of international rules, a number of such groups. It is apparent, also, that the nature of a law presupposes that there shall be an inferior being, or inferior beings, to whom the rule of action may

[1] Blackstone Commentaries, page 44.

be directed, and upon whom there shall rest the obligation or necessity of obedience. The third element that seems necessary to the existence of a law is that there shall be behind it the power to enforce obedience to its provisions. Without this last feature, a rule of action in a political sense would be entirely without significance and human government would be impossible.

Resulting from the conditions outlined above as being necessary to the existence of a law, we find that every such rule of action may be said to embrace at least three distinct parts, all of which are either expressed or implied in each rule; and to some laws, especially such as enjoin public duties, a fourth element pertains. In that which is called the "declaratory" part, the legislator defines the subject matter of the law, stating what is to be done or not to be done; the "directory" part indicates the legislative will as to the conduct of the citizen relative to the subject matter of the law; in the "remedial" part, is found the means of enforcing a right, of obtaining a remedy where a wrong has been done; and, finally, the "vindicatory" part or sanction, which pertains more especially to laws relating to public duties, defines the penalty to be incurred through disobedience.

Common law, as defined by Sir William Blackstone, is "The law common to all the realm. A collection of maxims and customs, of higher antiquity than memory or history can

reach."[1] In a United States case, Justice Sawyer says it is "reason dealing by the light of human experience;"[2] and in a Pennsylvania case Chief Justice Lowrie says: "Common law grows out of the general customs of the country. * * * The common law of one country, or century, is not necessarily the common law of another, because customs change. It is a sort of law created by the people themselves. When the judges declare it, they merely discover and declare what they find existing in the life of the people as a rule of their relations. * * * It is this law that people emigrating take with them by tacit adoption, as far as is consistent with their new circumstances."[3]

As explained in the Introductory Thesis contained in this book, the common law of the several states of this Union is based upon the English common law, many principles of which were adopted by the colonies immediately upon their settlement here, while others were gradually so modified as to adapt them to the peculiar conditions of colonial life. With such a basis the States have developed each its own system, but all agree in the main, except where in a few instances some other system of common law formed the basis of State jurisprudence. The most marked exception is Louisiana, which was col-

[1] Blackstone Commentaries, page 67.

[2] Dickerson v. Colgrove, 100 U. S. 584, 25 L. Ed. 618, 9 U. S. Notes 872.

[3] Effinger v. Lewis, 32 Pa. St. 369.

onized by the French, and consequently took her first legal principles from the system of that people.

In the absence of statutory rules, the courts of each State are guided by the principles of common law in force within its territory.

The term "general law," sometimes loosely used for common law, is applicable to such rules as relate to a whole class or order of persons, as distinguished from "special law," a term applied to rules framed to include less than an entire class, or restricted in their operations to a certain locality. At common law the courts would not take judicial notice of a special law, but it was necessary for the party relying upon it to plead it and prove its existence as he would prove any other fact.

"The Civil Law" was the municipal law of the Roman Empire. The adjective "civil" is derived from the Latin word *civis*, meaning citizen, so the term "civil law" means simply the citizen law or law of the citizen of Rome. Its principles form the foundation of the common law of most modern nations of continental Europe, contributing in an important sense to that of Great Britain, and through that channel to the jurisprudence of the States of this Union; they having their common law based upon that of the English people.

The term "civil law" in our own system of jurisprudence refers to "The laws which a com-

munity or state has established for the regulation of its own affairs, as distinguished from the law of nations; also, that portion of such laws which regulates dealings between subjects or citizens, in distinction from criminal law, military law, maritime law, and the general law-merchant."[1]

Criminal law is the law relating to crimes or public wrongs. Public wrongs or crimes, in their relation to criminal law, do not necessarily involve the idea of moral turpitude or possess an element of evil in their nature. Any sovereign state, in the pursuit of a given policy, may arbitrarily enact laws against the doing of certain acts, innocent in themselves, and thereby convert those acts into offenses against the state, or crimes. In its legal sense the word crime has been briefly defined as "An act that subjects the doer to legal punishment."[2] While in a Wisconsin case its meaning has been more fully expressed as "A wrong of which the law takes cognizance as injurious to the public, and punishes in what is called a criminal proceeding prosecuted by the State in its own name or in the name of the people or the sovereign."[3]

A statute law, otherwise called written or positive law, is a legislative enactment. The two branches of this department of law, known re-

1 Anderson's Dictionary of Law.
2 Standard Dictionary.
3 Re Bergen, 31 Wis. 386 (1872).

spectively as Federal statutes and State statutes, with their relations to each other and to the common law, are briefly treated in the Introductory Thesis.

The term "organic law" is applied to the principles upon which a state is organized and which may be found in its constitution. It is defined as "The fundamental law of a community or state, whether written or unwritten."[1] It must be borne in mind that the terms "written" and "unwritten," as used in their relation to law, are not to be understood strictly in their ordinary sense. "Written" is applied only to such laws as have been enacted by the legislative power of a state and formally written out as statutes. While "unwritten" is applied to the common law of the land, embracing a vast body of rules and principles to be found in the decisions of the highest courts and in the text books published by numerous able writers.

These principles, though they have been many times reduced to writing in their application by the judges to the settlement or adjudication of countless cases, yet preserve their elastic character and have never been reduced to a positive, inelastic rule of universal application in the nature of a statute.

In the definition of organic law given above, written fundamental law refers to a constitution which has been drawn or written out as a set of

[1] Anderson's Dictionary of Law.

specific and positive rules, the whole making one complete and clearly defined document; while unwritten fundamental law refers to a constitution which has never been thus reduced to a set of specific positive rules, but exists in the form of established principles, more in the nature of common law. The Constitution of the United States furnishes a good example of the former, while the Constitution of Great Britain is typical of the latter.

"Foreign law," as implied in the language, means simply the law of another sovereignty or nation.[1] Our courts take judicial notice of the laws belonging to this country; that is, when the attention of the court is directed to such a law, authentically published, it is deemed to be within the knowledge of the court and no proof of its character as law is required. It is otherwise, however, with foreign law, which must be proven like any other fact.

International law or law of nations, called also public law, is most simply defined as "The rules which determine the conduct of the general body of civilized nations in their dealings with one another."[2]

Private international law, known also as conflict of laws, is the name applied to those rules which a state adopts for the guidance of its courts in the application of the laws of another inde-

1 Anderson's Dictionary of Law.
2 The Principles of International Law. Lawrence.

pendent state to such cases, coming within their jurisdiction, as involve some foreign element either as to parties or as to subject matter.

International law, both public and private, is more fully explained in the Introductory Thesis, and it will be sufficient to say here that our courts take judicial notice of the rules embraced in both branches.

Jurisprudence, in its more limited and scientific sense, is the science of interpreting and applying the laws in the adjudication of cases. The word is used also more broadly and loosely to express the entire system of laws in force in any stated country, as distinguished from those of other countries, as, for instance, the Roman system of jurisprudence; and, again, to distinguish the application of the principles of the law to the conditions of any particular vocation, together with the body of specific or positive rules peculiar to such vocation, as medical jurisprudence, Pharmacal Jurisprudence, etc.

It will be well at this point in our work to fix the attention upon the fact that, aside from the few special statutory rules which may be enacted by the legislative power to meet the peculiar requirements of any business or profession, the great body of rules controlling the same must be drawn from the general principles of the law. The work of discovering the right principle and wisely applying it to the case at issue is the duty of the judge, and is a practical application of the

science of jurisprudence. For instance, if a physician undertakes the treatment of a sick man, there is an implied contract on the part of the physician that he will use in the treatment of his patient, at least ordinary skill and care. If injury to the patient results from the treatment and a suit for damages is brought against the physician, in which such acts are charged as amount to a violation of the implied contract, the judge, if he finds no precedent, similar case to supply a rule to guide him in his decision, may be obliged to have recourse to the general body of contract law to find a principle that may be applied to the decision of the issue before him. Yet, in making the application of any such principle, due regard must be had for all the unusual conditions that may appear in the case as the result of the peculiar character of medical science and practice. In order that the judge may act advisedly in so delicate a matter, and wisely apply the law, it may be necessary for him to supplement his own knowledge with the testimony of expert medical witnesses.

The foregoing brief explanation of the science of jurisprudence may assist the reader to understand the real nature of Pharmacal Jurisprudence, and to discover whatever there may be of fitness in the definition which has been framed for the subject of this book.

Pharmacal Jurisprudence treats of the application of the principles of the law to conditions

developed by the practice of pharmacy, and embraces such rules of positive law as have been made to meet the requirements of those conditions.

The definition here given assumes, fundamentally, that this branch of the law is not to be regarded as a system of new principles but rather, the application of well-known and established principles to the circumstances attending a comparatively new field of litigation. Our laws, perforce of necessity, group themselves along the lines of greatest activity, and where nothing is done no regulating or controlling rules are needed; but to whatever line of operations human interest and energy are directed, there the law must promptly extend its controlling arms for the regulating and enforcing of human rights. Thus arises a new demand for the judicial function in applying old legal principles to new conditions, and from this, as a natural sequence, there results the gradual development of a new branch of law or jurisprudence. Of course it is apparent that whenever a profession or business arises to the dignity of furnishing a name for a new branch of the world's jurisprudence, it has thus given the strongest evidence possible of its own growth and significance.

Although the first part of our definition of Pharmacal Jurisprudence includes the principal features of the subject, yet its entire scope cannot be indicated without the addition of the last

part. Some positive laws have been enacted both in this country and Great Britain, having for their object the regulation of the practice of pharmacy, and a definition of this branch of jurisprudence must be so framed as to include these positive rules or legislative enactments.

From this brief study of the definition of our subject, some inferences may be drawn concerning the legitimate range or limits of the ground to be covered by this treatise. It will be apparent that if the work were restricted to the discussion of such statutory rules as have been enacted on the subject, together with the decisions applying and interpreting these rules, it would require but little time and labor to complete the undertaking. But when it is remembered that Pharmacal Jurisprudence consists chiefly in the application of principles, selected from different branches of the law in general, to specific cases arising out of the practice of pharmacy, and that the subject has its commercial as well as its professional aspect, it will be seen that our field of operation promises to develop outlines of considerable magnitude. After a rapid glance at the origin and history of this part of the law, both the past and the present legal status of the pharmacist, the legal limits of the profession of pharmacy and its relations to its kindred profession of medicine, and the legal relations of the pharmacist to statutory boards of pharmacy, it is proposed to next examine some of the principles

of the law of contracts within the limits of their application to our subject. The scope of our work will require an investigation of the law governing pharmacal malpractice and the general liability of the pharmacist in that regard; and in this connection the liability of the manufacturing pharmacist will be the subject of consideration. The law of agency must claim the attention of the reader, with a view to disclosing the legal relations existing between the manufacturer and the retail dealer and pharmacist on one side and their several employes on the other side, with the resulting liability of the former for acts done by the latter. It will be necessary to examine a number of other principles and statutes, selected from the law in general on account of their indirect or incidental bearing upon matters that fall within the range of our subject.

In the discussion of the various legal principles suggested above, it is proposed to introduce numerous decisions for the further elucidation of these principles and to show their practical application to pharmacal conditions. In some of the leading cases, the opinions handed down by the courts in rendering their decisions will be given in full, in order that the lines of reasoning followed by the judges may give more vivid conceptions of the several principles and their application to the facts. In other cases the decisions will be presented more briefly, embodying only the conclusions reached by the courts. A

brief summing up or digest of the rules deduced will conclude each topic discussed.

The scope of the treatise requires the consideration of the statutory provisions regulating the practice of pharmacy in this country, embracing a study of the conditions which led to the action of the several legislatures in this regard; with a discussion of their constitutionality, their relations to the general law, their territorial limits, and their interpretation by the courts in such cases as have arisen under them. It will be necessary to consider, also, the main features of an ordinary action at law, and the relations which a pharmacist may sustain to such an action either as a party or as an expert witness.

A number of practical questions, incidentally touching the profession of pharmacy, demand treatment in connection with a work of this kind; among which are the legal status of the physician's prescription, as to the several interests of physician, patient and pharmacist; insurance law relating to a stock of drugs, or to a mixed stock; and the origin, nature and use of trade marks, with the penalty for the violation thereof. Any other legal rule or principle, having a practical bearing upon either the professional or the commercial aspect of pharmacy practice, may be deemed properly within the limits of Pharmacal Jurisprudence.

## CHAPTER II.

### HISTORICAL VIEW OF THE SUBJECT.

In the Introductory Thesis, the history and outlines of our present system of law in general has been briefly indicated, and it is now proposed to touch, with equal brevity, upon the beginnings and growth of Pharmacal Jurisprudence considered as a special department or branch of the law.

Our researches along the line of legal history lead us back to a period of time but slightly removed from that in which, in the opinion of "good society," a knowledge of "simples" was quite sufficient to damn its possessor as a wizard or witch; and when an unwary person, chancing to fall into the neighborhood of something which even distantly resembled a chemical laboratory, crossed himself vigorously as a kind of disinfection from an unwholesome, brimstone atmosphere.

Strictly speaking, pharmacy, as a distinct and scientific profession, had its birth in the early part of the nineteenth century; but its principles have been known, studied, and used in connection with medicine for many centuries. We find that the principles of pharmacy were practiced successively by grocers, chemists and druggists, and apothecaries long before the term "pharmacy" was generally applied to that

branch of science; but for convenience throughout this chapter, that modern and scientific term will be used in speaking generally of the legal history of the principles now embraced within its meaning.

Except that learning, itself, possesses an innate and immortal dignity, pharmacy does not occupy a very dignified position in history. It is old in its researches and learning, but comparatively new so far as concerns its recognition by the world as one of the most useful of all sciences and professions. Medical jurisprudence and forensic medicine, as branches of the law, possess a history centuries old; and even dental jurisprudence, young as is the profession of dentistry, found an able exponent in the late Mr. Rehfuss, whose excellent book is now an authority on that branch of the law; but Pharmacal Jurisprudence, except as touched upon by writers on medical law, has not heretofore, to any extent, engaged the attention of law writers, nor has it received that degree of consideration from either lawyers or pharmacists to which its importance entitles it. The Department of Pharmacy of the University of California was probably the first college of pharmacy in America to add this important feature to its course of study, and the author is not aware that there exists, at the time of this writing, any text book or compilation of decisions on this branch of the law. This poverty of judicial record in the past is

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owing, it is thought, to the rather humble attitude of the profession of pharmacy during the centuries preceding the nineteenth; and the fact that the practice of this profession, wherein exist so many opportunities for serious and even fatal mistakes, has not developed a greater amount of litigation during the present century, may be attributed, largely, to the studious and painstaking character of the main body of its members.

Undoubtedly most civilized countries have, at various times, enacted laws of the nature of police regulations, relating to the sale or dispensing of poisons and other drugs. Shakespeare affords us a vivid picture, suggestive of the general status of pharmacy and of the law environing it in Europe, prior to and during that great writer's time. Like most of his writings, this graphic account seems to speak the sharp truth of an age in which the dominant classes of society were yet dull to all learning, and saw in "Will Shakespeare" himself, but a common play-actor. In the passage referred to, Romeo, hearing, as he believes, of the passing of the soul of Juliet, desires a "dram of poison" as a means by which to cross the dark barrier that separates him from his lost love:

"I do remember an apothecary,—
And hereabout he dwells,—which late I noted
In tattered weeds, with overwhelming brows,
Culling of simples; meager were his looks,

Sharp misery hath worn him to the bones:
And in his needy shop a tortoise hung,
An alligator stuffed, and other skins
Of ill shaped fishes; and above his shelves
A beggarly account of empty boxes,
Green earthen pots, bladders and musty seeds,
Remnants of packthread and old cakes of roses,
Were thinly scattered to make up a show.
Noting this penury, to myself I said
'And if a man did need a poison now,
Whose sale is present death in Mantua,
Here lives a caitiff wretch would sell it him.' "

In response to Romeo's demand for poison, accompanied by a liberal offer of gold, mindful of the danger threatened by the law, the apothecary replies:

"Such mortal drugs I have; but Mantua's law
Is death to any he that utters them."

The apothecary yields at last to the demands of the insistent, would-be suicide and says:

"My poverty but not my will consents." Then Romeo:
"I pay thy poverty, and not thy will."

The lean and pitiful aspect of the person described, doubtless as a type of his profession, suggests the very slight esteem in which that profession was held; while his fearful reference to the terrors of the law sheds light upon the legal policy of that age and country in regard to the

sale of poisonous drugs. The lesson conveyed by these lines from Shakespeare is more of inference than of fact, but it warrants the conviction that the law, even then, took notice of the dealer in drugs, though to him its only aspect was threatening and it might have availed him nothing in the way of protection.

The typical modern drug store or pharmacy, when compared with the shop described by Shakespeare, speaks eloquently of the changed conditions. Understood and appreciated by the public, protected and fostered by the law, the calling of the pharmacist is rising to its legitimate place of dignity among the learned professions of the world; and the men who represent it are now the peers of any in respectability and social standing, as they have always been in intelligence and learning.

We must, of course, look to the parliamentary acts and judicial records of England for the more definite beginnings of this department of jurisprudence. Ordronaux and other American writers, who have referred to this branch of the law, have classed the apothecary of England, as to his professional and legal character, as the predecessor of our modern pharmacist. This classification is true in a limited sense only, as the English apothecary, at least as far back as the year 1543, has always been a lawful practitioner of medicine within certain limits. It is probable that during the earlier part of this time,

the apothecary was the exclusive representative of the drug business, but it is certain that later there grew up a class of druggists, or chemists and druggists, who were entirely distinct, in their character and legal responsibilities, from the apothecaries, and the distinction still exists since the former class has developed into the pharmacist of more modern times. However, since the apothecary, in his double character of doctor and pharmacist, continued to compound medicines for the physicians, even while the chemist and druggist was operating in the same line, and since the law took notice of him with regard to his duties as a dispenser of drugs, we shall glance at some of the English statutes enacted to that end.

It seems that the apothecary took his name from ancient sources, suggesting a history too remote for our present uses, it being derived from the Greek *apotheke,* compounded of *apo,* away, and *tithimi,* to put, through the Latin *apothecarius,* a storekeeper, from *apotheca,* a store. As the name implies, we find the apothecary in England, in earlier times, a storekeeper, classed with the grocers of the country and possessing the same legal status; while in more recent years he is found presiding over what is popularly called a "doctor's shop." But even in the earlier times referred to, the apothecaries must have been an active and quasi scientific body of men, known to possess a sphere of usefulness somewhat broader

than that of grocers in general. That such was the case is strongly implied by the Act of Parliament, 34 and 35, Henry VIII ch. 8, passed in 1543.

Parliament designed, by the act referred to above, to remedy certain evils which had grown up in connection with the practice of London surgeons, concerning whose ignorance and disreputable conduct the preamble speaks in terms of great severity. The body of the statute is expressed in the following quaint language: "Be it ordained, established and enacted by the authority of the present Parliament. That at all times from henceforth it shall be lawful to every person being the King's subject, having knowledge and experience of the nature of herbs, roots and waters, or of the operation of the same, by speculation or practice, within any part of the realm of England, or within any other part of the King's dominions, to practice, use, and minister in and to any outward sore, uncome, wound, apostomations, outward swelling or disease, any herb or herbs, ointments, baths, pultess and emplaisters, according to their cunning, experience and knowledge in any of the diseases, sores and maladies beforesaid, and all other like to the same, or drinks for the stone, strangury or agues, without suit, vexation, trouble, penalty, or loss of their goods, the aforesaid statute in the foresaid third year of the King's most gracious reign, or any other act, ordinance, or statute to the

contrary heretofore made in any wise notwithstanding."

The passage of the above law was highly advantageous to those who possessed a knowledge of drugs, and skill in their application; and on account of the encouragement which it gave to this department of science, it may be regarded as having been a very significant force in the development of modern excellence in pharmacy. Yet, however, it was nearly three-quarters of a century after this important step, before the apothecaries of England received full recognition by the government and acquired their present legal status as a distinct corporation.

In regard to the separation of the apothecaries from the grocers, Ordronaux says: "Drugs or medicines, as a marketable commodity, seem originally to have sprung from the field of provisions among which as it is well known are to be found many substances having a therapeutic as well as an alimentary character. Hence, grocers or poticaries, as they were synonomously called, formed one of the ancient companies of the City of London, until the year 1615, (13 Jac. 1.) when, from the glaring mischiefs already seen to arise through the sale of improper medicines, the propriety of separating the apothecaries from the grocers company became a matter of public necessity."[1]

[1] Jurisprudence of Medicine. Ordronaux, pages 254, 255.

The preamble of a later English statute, referring to this act of 1615, says: "His Majesty King James the First, by Letters Patent, under the Great Seal of Great Britain, bearing Date the Sixth day of December, in the Fifteenth year of his Reign, did for himself, his Heirs and Successors, grant unto William Besse, and divers other persons therein named, and to all and singular other Persons whomsoever, brought up and skilful in the Art, Mystery or Faculty of Apothecaries, and exercising the same Art, Mystery or Faculty, then being Freemen of the Mystery of Grocers of the City of London, or being Freemen of any other Art, Mystery or Faculty in the said City of London (so as they had been brought up and were expert in the Art or Mystery of Apothecaries) that they and all such Men of the said Art and Mystery of Apothecaries, of and in the said City of London and Suburbs of the same, and within Seven Miles of the said City, might and should be one Body Corporate and Politic, in Substance, Deed and Name, by the Name of 'The Master, Wardens and Society of the Art and Mystery of Apothecaries of the City of London.' "[1]

During the years that had passed since the act of 1543, the apothecaries had undoubtedly availed themselves of opportunities to practice medicine, at least to the extent of the limits imposed by that act, and, judging from a case which

[1] 55 Geo. III. Ch. 194, Preamble.

occurred early in the eighteenth century, it seems that they did not uniformly observe those limits. The case referred to is that in which the College of Physicians prosecuted Rose, in the Court of King's Bench for prescribing a pill for a butcher named Seale. They obtained a judgment against Rose, but, on appeal, the judgment was reversed in the House of Lords; that august body considering it to be wrong to compel every sick person to employ "a physician to prescribe, an apothecary to dispense and a surgeon to let blood."[1]

The ambition of the apothecaries seems to have been directed chiefly towards the practice of medicine, though it continued to be their practice and legal duty to prepare and administer medicines under the direction of properly qualified physicians. The encouragement given to them by the courts as well as by Parliament, beginning with the act of 1543, added materially to the profit, dignity and general attractiveness of the profession. But, wherever there exists a desirable field for the exercise of human talent and activity, among its learned and worthy representatives will also be found the encumbering bulk of the ignoramus and the resounding vacuity of the charlatan; and pharmacy in England, as practiced by the corporation of apothecaries, under those earlier statutes, was no more of an exception to the rule than it was in later times as

[1] College of Physicians v. Rose, 3 Salk. 17, 7 Mod. 44 H. T. 1703.

practiced in this country. The record of mistakes and malpractice assumed, at length, such aggravated proportions, and the act of 1615 was so inadequate to the increased requirements of the profession, that the apothecaries themselves were glad to seek relief at the hands of Parliament from the growing odium which necessarily attaches to the unrestricted acts of ignorance and fraud.

In the year 1815, just two hundred years after the act was passed by which the apothecaries were incorporated originally, a comprehensive statute was enacted by Parliament, by which the earlier act was altered, "varied and enlarged, and further and other provisions made;" and the fifth section of this act, specially designed to govern the apothecaries in their capacity as pharmacists, says: "And whereas it is the Duty of every Person using or exercising the Art and Mystery of an Apothecary, to prepare with Exactness, and to dispense such medicines as may be directed for the Sick by any Physician lawfully licensed to practice Physic by the President and Commonalty of the Faculty of Physic in London, or by either of the two Universities of Oxford or Cambridge; Therefore, for the further Protection, Security, and Benefit of His Majesty's Subjects, and for the better Regulation of the Practice of Physic throughout England and Wales, be it enacted, That if any Person using or exercising the Art and Mystery of an Apoth-

ecary, shall at any time knowingly, wilfully and contumaciously refuse to make, mix, compound, prepare, give, apply or administer, or any way to sell, set on sale, put forth or put to sale, to any Person or Persons whatever, any Medicines, Compound Medicines, or Medicinable Compositions, or shall deliberately or negligently, falsify, unfaithfully, fraudulently or unduly make, mix, compound, prepare, give, apply or administer, or any way sell, set on sale, put forth or put to sale to any Person or Persons whatever, any Medicines, Compound Medicines or Medicinable Compounds, as directed by any Prescription, Order or Receipt, signed with the Initials in his own Hand-writing, of any Physician so lawfully licensed to practice Physic, such Person or Persons so offending shall upon Complaint made within twenty-one Days by such Physician, and upon Conviction of such Offense before any of His Majesty's Justices of the Peace, unless such offender can show some satisfactory Reason, Excuse or Justification in his behalf, forfeit, for the First Offense, the sum of Five Pounds; for the Second Offense the sum of Ten Pounds; and for the Third Offense he shall forfeit his certificate, and be rendered incapable in future of using or exercising the Art and Mystery of an Apothecary, and be liable to the Penalty inflicted by this Act upon all who practice as such without a certificate," etc.[1]

[1] 55 Geo. III, Ch. 194.

The act provides for a Court of Examiners to test the qualifications and fitness of those who aspire to become apothecaries, and to issue certificates to all such as they find to be properly qualified to practice. It prohibits from practicing all persons "(except persons already in practice as such)" who are without such certificates and provides penalties for violation of the statute.

Before this act of 1815 was passed, there had grown up in England outside of and distinct from the corporation of Apothecaries, a class of business men known as chemists and druggists, whose occupation seems to have been about the same as that of the pharmacist of to-day; though, probably, they did not enjoy the same breadth of scientific knowledge and training. The practice of the chemist and druggist of that period does not appear to have been the object of any restrictive legislation; but they exercised their "Trade or Business" free from any rule of positive law as to examination or qualification, and their liability, like that of the grocers, was governed entirely by the principles of the common law. They are expressly exempted from the operation of the act of 1815, by the provisions of Section 28 which says: "Provided always, and be it further enacted, That nothing in this Act contained shall extend, or be construed to extend, to prejudice, or in any way to affect the Trade or Business of a Chemist and Druggist, in

the buying, preparing, compounding, dispensing and vending Drugs, Medicines and Medicinable Compounds, wholesale and retail; but all Persons using or exercising the said Trade or Business, or who shall or may hereafter use or exercise the same, shall and may use, exercise and carry on the same Trade or Business in such manner, and as fully and amply to all Intents and Purposes, as the same Trade or Business was used, exercised or carried on by Chemists and Druggists before the passing of this Act."

The policy of the English law, as it appears from the statute last under discussion, seems to have been hardly uniform in its operation. The right to practice pharmacy, as exercised by the members of the corporation of apothecaries, was enjoyed only under distinct legal restrictions as to qualifications and general fitness; while the same right was freely exercised by the chemists and druggists without any such legal limitations. It is possible that the duties of an apothecary, acting in the capacity of a pharmacist, may have been regarded as of a more highly responsible character than those of the chemist and druggist, owing to the fact that the former were required, not only to compound the medicines prescribed by the physician, but also to "give, apply or administer the same to the patient."

European legislation relating to pharmacy has proceeded on lines nearly parallel to that followed in England. Concerning the French stat-

utes regulating the practice of apothecaries, Ordronaux says: "In 1484, under Charles VIII of France, several ordinances were passed bearing upon their rights and duties; these ordinances were further added to under Louis XII, in 1514; under Francis I, in 1516 and 1520; under Charles IX, in 1571; under Henry III, in 1583, and Henry IV, in 1598. Louis XIII confirmed their ancient charters in 1611 and 1624, and in 1638 appeared the final statutes under which the corporation has ever since governed itself." Speaking of the legal status of apothecaries as compared with that of the ordinary druggist in France, he says: "The code Napoleon makes a trenchant distinction between apothecaries and simple druggists, in the rights severally accorded them to deal in drugs. The former, who are assumed to be pharmaceutically educated, are alone allowed to sell compounded medicines; the latter, who are mentioned in it along with grocers, are only permitted to sell drugs of a simple character, in bulk and at wholesale."[1]

The regular apothecary, on the English plan, does not seem to satisfy the requirements of either pharmacy or medical practice in the United States, and the "doctor's shop" is an institution which is not in harmony with the prevailing American idea as to the highest possibilities of either of the learned professions, between which in England it forms a kind of rusty link. The ambition of the earlier English apothecary

to practice medicine has been worked out to a point of realization by his successors, and the world has witnessed in him, the evolution of a doctor from the primitive vender of drugs and medicines—a doctor who yet maintains his *apotheca* or shop, while doing a large proportion of the medical practice of his country. He continues to be a combination of the skilled pharmacist and the licensed medical practitioner. The tendency of medical science in America is toward maintaining and fostering a distinct, scientific and well-educated profession of pharmacy on the one hand, and an exclusive, restricted, and highly trained body of physicians on the other; while the legislatures of the several states have shown themselves to be in sympathy with a doctrine that is at once ethically sound, and eminently practical in operating to protect the lives and health of the people.

## CHAPTER III.

### Legal Limits of Pharmacy.

Pharmacy is defined as "The art or practice of preparing and preserving drugs and of compounding and dispensing medicines according to the prescriptions of physicians;" and a pharmacist is "One skilled in the art and science of compounding and preparing medicines." The word pharmacist is derived from the Greek word *pharmakeia,* from *pharmakeuein,* meaning to administer or use drugs.

From the definitions given in the preceding paragraph, it may be said that the "practice of pharmacy" is the practical application of the principles of the science of pharmacy to the actual preparing, preserving, compounding, or dispensing of medicines. The courts of this country have not yet defined the exact scope of the practice of pharmacy, by furnishing us a judicial statement of the limits within which the operations of the pharmacist must be confined; but the New York statute, regulating the "practice of pharmacy," indicates that the latter term signifies the compounding of prescriptions, or of any U. S. pharmacopœial preparation or of any drug or poison, to be used as a medicine, and the retailing of any drug or poison. This may serve as a legal definition and will probably be found in harmony with the spirit of each of the several

State statutes on the subject throughout the Union.

In our endeavor to arrive at a useful, working idea of this branch of our subject, it will be well, at the beginning, to remember that the qualified pharmacist stands in the relation of beneficiary to the statutory provisions regulating the practice of his profession. The limitations embraced in those provisions are directed against the interference or encroachments of those who are not legally qualified to practice pharmacy; thus giving to the lawful practitioner the exclusive privileges peculiar to that profession, while leaving him in the unrestricted enjoyment of all rights and immunities possessed by the ordinary lay member of society. It might appear from this view of the case, that in the general adjustment of professional rights, the pharmacist had been left without any legal restrictions upon the field of his operations; and such might have been the case had his profession been the only one which the policy of the law saw fit to protect. As it is, however, the law has thrown around certain other professions, regulating and protecting limitations similar to those which guard from encroachment the legitimate field of the pharmacist; and it is to these that the pharmacist must look for the legal danger line beyond which he must not pass. The profession of pharmacy, in its very nature is kindred and contiguous to the medical profession. They possess a common but

clearly defined frontier line, which has long been the scene of mutual trespasses, and has served to repress or limit the operations of the pharmacist in that direction.

What the pharmacist may legally do, in excess of the rights of other citizens, is implied with sufficient clearness in the definitions of "pharmacy," "pharmacist," and "practice of pharmacy," already given in this chapter. What he must refrain from doing is, in general, embraced within the negative obligations of every good citizen; but it is necessary to treat this subject in a more specific sense, by directing our investigations to those points which are of peculiar danger to the pharmacist, in consequence of their presenting the temptation offered by frequently recurring opportunity. As already indicated, the greatest danger of this kind lies along the line between pharmacy and medicine, and the limits there imposed may be best understood by studying the prohibitory features and application of the statutes regulating the practice of medicine.

Under the statutes of the several States prohibiting the practice of medicine by any person not authorized by law to do so, we find several interesting decisions in which the restrictions intended to be imposed upon unlicensed practitioners are clearly discussed and applied. In examining these cases it should be kept in mind that the pharmacist, though licensed to practice

his own profession, occupies no better position, so far as concerns the right to practice medicine, than that held by any other person, and that the limitations imposed by law operate against all with equal stringency.

Those persons who have undertaken to openly defy these statutes regulating the practice of medicine, have generally relied upon being able to successfully attack their constitutionality, just as similar efforts have been made to defeat the acts regulating the practice of pharmacy and the practice of dentistry; but the constitutional questions raised in this connection will be considered in another chapter. It will suffice to say here that the statutes have been uniformly upheld.

The cases which claim our attention under the heading of this chapter are mainly such as have arisen through attempted evasions of the law, and wherein either some person has been prosecuted for illegal practicing, or suit has been brought by an unauthorized practitioner to collect fees for illegal services, under the cover of a claim for medicines sold; thus, in the latter case, bringing the issues raised very near to the domain of pharmacy.

In an early New York case, it was held that no person, practicing without a license, could recover for services rendered or medicines furnished as a physician or surgeon.[1] In the same State, in the year 1828, Barber, the plaintiff in

[1] Timmerman v. Morrison. 14 Johns, 370.

the lower court, but defendant on appeal, was an unlicensed practitioner, and commenced an action against Alcott "for botanical medicines for daughter, at three different times in the year 1824, amounting to $18." One point in the defense was "that the plaintiff was not a licensed physician," and therefore not entitled to recover. The plaintiff obtained a judgment in the lower court for $15.66. On appeal, Chief Justice Savage delivered the opinion of the court, which, being short, is here presented in full. "This case seems to be an attempt to evade the statute, which prohibits a recovery by a medical practitioner who is not regularly licensed. The counsel for the defendant in error takes a distinction between the practitioner of physic and apothecary, which undoubtedly is correct, but seems to me not applicable to this case. The defendant in error traveled three times from Auburn to Rochester, to visit the plaintiff's daughter. He was sent for after other physicians could do no more. He came and prescribed for the patient, and cured her by the use of two phials of medicine and a box of ointment. What the medicines were the witness knew not. She was asked the value of the medicine, simply, for her answers show that she estimated the services of the defendant in error as worth $16 or $18, because the patient was cured. The medicine at the apothecary's shop would probably have been worth only a few

shillings; but here the witness and the jury undoubtedly estimated the service of the physician. When the same person officiates as physician and apothecary, he comes within the decision of this court (Timmerman v. Morrison, 14 Johns. 369) that an unlicensed practitioner is incapable of suing for services rendered or medicines furnished, as a physician. As the patient was cured, it is to be regretted that Barber was not paid; but if unlicensed pretenders to skill in diseases can recover as in this case, the statute may become a dead letter; the country will be filled with mere quacks, peddling their nostrums, and deceiving and destroying the ignorant and credulous, the very mischief which the statute is intended to prevent. I do not say that the defendant in error is a mere pretender, for he cured his patient, and in honor and honesty, should have been paid; but it is our duty to administer the law. I am of opinion that the court erred, and that the judgment below must be reversed."[1]

In the year following that which Alcott v. Barber was decided, New York furnished another case in which the court endorsed the earlier decisions, and in which, also, was introduced the patent medicine phase of the contest.

In this case the unlicensed practitioner, Tracy, sued his patient, Smith, to recover the alleged price of medicine furnished by the plaintiff. The

[1] Alcott v. Barber. 1 Wend. 526.

defense was based upon that part of the New York statute which then provided that every person "not authorized by law, who, for any fee or reward, shall practice physic or surgery, within the State, shall be incapable of recovering by suit any debt arising from such practice." In rendering its decision the court said: "In the case of Timmerman v. Morrison, the Supreme Court held, that no person, practicing without a license, could recover for services rendered or medicine furnished as physician or surgeon. It is contended by the plaintiff, that the patent in evidence in the case, gives him the right to sell the medicines in question, notwithstanding the provision of the State law, and his general right to sell the medicines, as an apothecary, is not questioned in this case. The patent confers no additional right on him, but precludes others from selling or using them. The State law, by the construction given to it by the Supreme Court, prohibits him from peddling his medicines, in the character of a physician, and inducing people to buy and use them, in consequence of their reliance on his pretended skill. Such practices the law of the State has declared to be dangerous to the public health, and if the patent in question had authorized him, in express terms, to vend this medicine in the manner in which he has done in this case, I should have no hesitation in holding that the patent would be inoperative against the provision of the law."

It was held also, in this case, that the fact that the defendant knew, when he employed the plaintiff, that the latter was unlicensed, does not distinguish the case from Alcott v. Barber.[1]

In the New York reports we find a case, decided in 1836, in which a person, not licensed to practice, appears as the defendant, being prosecuted for prescribing a patent medicine. This case was appealed from the Mayor's court of the city of Albany.

"Staats sued Thompson in the Justices' Court of the City of Albany for practicing physic, not being authorized by law. It was proved that the defendant visited a sick man, felt his pulse and gave him medicine, which he took, and charged and received two dollars from the patient. The defendant offered in evidence letters patent, granted under the laws of the U. S. to Samuel Thompson, 28th of June, 1823, authorizing him and his assigns, for the term of 14 years, to make, construct, use, and vend to others to be used a certain improvement in the preparing, mixing, compounding, administering and using certain medicines, and offered to prove that the defendant (John Thompson) was an assignee of the patentee, and that the medicine administered by him to the patient was *composed of the materials,* and *compounded in the manner* described in the schedule annexed to the letters patent;

[1] Smith v. Tracy. 2 Hall N. Y., 465 (501).

and insisted that as such assignee he had the right under the patent, to administer such medicine, without being licensed to practice physic, as required by the laws of this State. The evidence was objected to by the plaintiff and rejected by the court. The cause was tried by a jury, who found a verdict for the plaintiff for $10, for which sum judgment was rendered. The Mayor's court of Albany, on certiorari, affirmed the judgment, and the defendant sued out a writ of error."

On appeal the following opinion was handed down by the Court, Nelson, Jr. "The letters patent were properly rejected as irrelevant. They only authorize the patentee and his assigns to make, construct, use and vend his newly discovered compound of medicine; not 'to practice physic or surgery,' within the regulations of the statutes of this State, as found in 1 R. S. 454, S. 16 and 19. This affords a sufficient justification for the decision, if there were no other reason for it. When the terms of the patent are broad enough to enable the patentee to put himself upon a footing with these statutes, it will be time enough to consider the constitutional question raised by the defendant, how far the law of Congress under which the patent was granted, and the laws of this State regulating the practice of physic and surgery, come in collision. The defendant pretended to no authority to practice physic under the laws of this State, and whether

he had thus practiced was a question of fact which the jury found against him. Judgment affirmed."[1]

The decisions of the New York courts show the law in that State as administered under earlier statutes prohibiting the practice of medicine without certain legal qualifications. But, in 1844, an act was passed by the legislature of the State which had the effect of abolishing all previous statutes regulating the practice of medicine, and authorizing anyone to practice physic or surgery, without any license, and to "prescribe for or administer medicines or specifics, to or for the sick," and permitting anyone to recover for services so rendered, simply at the peril of being sued for malpractice, and if convicted of malpractice, gross ignorance or immoral conduct, of being punished as for a misdemeanor. As a consequence of this statute, we find no cases applicable to the present discussion during a period of thirty years of New York's legal history; but in 1874 the matter was again made the subject of legislation, and an act was passed making it a misdemeanor for any person to practice medicine or surgery who is not authorized to do so by a license or diploma from some chartered school, state board of medical examiners or medical society, or who shall practice under cover of a medical diploma illegally obtained.[2]

[1] Thompson v. Staats, 15 Wend. 395.

[2] Laws of 1874. P. 557, Sec. 3.

Since the passage of the act last referred to, New York has to the present time maintained laws regulating and restricting the practice of medicine on or about the same lines, generally speaking, as the statutes under which the decisions quoted in this chapter were rendered; so that the principles therein stated are applicable to the determination of issues that may arise out of such illegal practice at the present time.

In a New York case, decided under the statute of 1880, it was held that no compensation can be recovered by a physician practicing without legal authority, although the statute does not expressly forbid such recovery.[1]

The State of North Carolina has furnished a case, decided in 1891, of some interest as showing the difference between the legal status of him who *prescribes* a patent medicine, and of him who simply sells it. The statute under which the case was tried provides "That any person who shall practice or attempt to practice medicine or surgery in this State without first having registered and obtained the certificate as aforesaid, shall be guilty of a misdemeanor."[2] The court said "If the defendant merely held himself out to the public as a physician or surgeon, he was guilty of the offense created by the statute." "An unlicensed person, claiming to be a physician and holding himself out to the world as such,

[1] Fox v. Dixon. 12 N. Y. Supp. 267, 58 Hun. 605.
[2] N. C. Acts of 89. C. 181, S. 5.

cannot, after examining a person who has asked his services, diagnosing the disease, fixing an amount or price for which he will cure the patient and giving him a prescription, evade the law by proving that the remedy administered was a proprietary remedy, prepared and used by him." Touching the rights of a seller of a patent medicine, the court said: "A vender of patent medicines who does not pretend to diagnose disease and determine which of the remedies is proper in a particular case, is not a violator of this statute."[1]

In a Kansas case, decided in 1890, the court defines "practice of medicine," and also squarely meets the question as to whether or not a person, not authorized to practice medicine, may recover the price of medicines furnished by him as a physician. The Kansas statute enacted to prevent empiricism, provides: "That it shall be unlawful for any person within the limits of the State of Kansas, who has not attended two full courses of instruction and graduated in some respectable school of medicine, either of the United States or some foreign country, or who cannot produce a certificate of qualification from a state or county medical society, and is not a person of good moral character, to practice medicine in any of its departments for reward or compensation, for any sick person within the

[1] State v. Van Doran, 109 N. C. 864, 14 S. E. Rep. 32.

State of Kansas."[1] In the case referred to, the court said: "To hold that a person who furnished medicine as a physician, could recover compensation for the medicine so furnished or prescribed, would, in our judgment render the statute nugatory, and any unauthorized person might prescribe for a patient and simply charge for his medicine, and thus defeat the very objects of the law. The practice of medicine may be said to consist in three things: First, in judging the nature, character and symptoms of the disease; second, in determining the proper remedy for the disease; third, in giving or prescribing the application of the remedy to the disease. If the person who makes a diagnosis of a case also gives the medicine to the patient, he is, in our judgment practicing medicine within the provisions of the statute in question; and if unauthorized to practice, or is acting in violation of the provisions of the statute, he is not entitled to compensation for the medicine which he furnishes at the time, as a physician; and the instruction of the court which said to the jury that the plaintiff below could recover for the medicine furnished, though he might not have been entitled to practice medicine, was erroneous; and for this reason the judgment of the court below should be reversed."[2]

[1] Gen. Stat. 1889, 2450.

[2] Underwood v. Scott. 43 Kas. 714, 23 Pac. 942.

In a California case, decided in 1889, it appeared that the plaintiff, who was a physician and surgeon, had commenced the treatment of his patient before receiving his certificate to practice. The treatment was continued, however, for a long time after the plaintiff had received and recorded his certificate. On appeal the court held that the issuance of the certificate to the physician did not relate back to the time that his services began, and that, therefore, during the time prior to the issuance of the certificate, he was practicing medicine in violation of the statute, and was entitled to recover pay only for the time subsequent to the granting of his certificate. On this point two of the justices dissented.[1]

Section 11, of "An Act to regulate the practice of medicine in the State of California," as amended in 1878-9, provides that "Any person shall be regarded as practicing medicine, within the meaning of this act, who shall profess publicly to be a physician, or who shall habitually prescribe for the sick, or who shall append to his name the letters 'M. D.'; but nothing herein contained shall be construed to prohibit gratuitous services in cases of emergency." In a case entitled "People v. Lee Wah,"[2] the trial court, in

[1] Gardner v. Tatum et al. 81 Cal. 370, 22 Pac. 880, 4 Cal. Notes 554.

[2] 71 Cal. 80, 11 Pac. 851, 4 Cal. Notes 313.

its instructions to the jury, defined "emergency" as "a case in which the ordinary medical practitioners of the schools provided for by the State, who are provided with the proper diplomas, and submitted themselves to the proper examination, are not readily obtainable. This is an emergency as where the exigency is of so pressing a character that some kind of action must be taken before such parties can be found or procured." In this case the court held that the fact that the patient has been given up by regular physicians does not constitute an "emergency" in the meaning of the statute.

The decisions which have been under consideration in this chapter, marking the frontier barrier of the medical profession, will, by making a practical application to the pharmacist of the points decided, serve, in a reasonable degree, to determine the limits of the practice of pharmacy on the side which is contiguous to the practice of medicine. The statutes regulating the practice of medicine, of the kind under which these cases arose, are now so generally maintained in the American states and Great Britain, as to make the principles decided of almost universal application throughout the two countries. However, since these statutes are subject to frequent amendment, most commonly on minor points but sometimes going to the very heart of the subject, it is always well for the pharmacist to note all

legislative movements in his state on lines so close to the interests of his own vocation.

We will now present a brief summary of the more significant points decided in these cases. It seems, from the weight of authority of general application in states where the practice of medicine is regulated by statute, that a person would be acting in violation of the law if he simply held himself out to the public as a physician, without actually having either diagnosed or prescribed in any case whatever.

The rule just stated presents perhaps, the most extreme position so far taken by the courts and it is the one least likely to be encountered by the pharmacist. He is more concerned with the rule that one not authorized, who diagnoses a case and gives a remedy for it, is guilty under the prevailing statutes. Now, to diagnose is "to distinguish a disease by its characteristic phenomena," and to do this, whether correctly or not, is sometimes a very simple process, and may be done by a person when standing behind the counter of a drug store, without fully realizing the legal significance of his own act. A person enters the store, possibly of one with whom he is acquainted, and complains of not feeling very well. There is nothing more natural in such a case than that the proprietor or clerk who meets him should ask a question or two relative to his symptoms, and thereupon suggest some simple

means of relief or remedy, which he immediately proceeds to prepare and sell to his *patient.* In the case here assumed, the pharmacist has both diagnosed and prescribed, making the offense complete; and yet throughout the entire transaction, may have been quite innocent of any criminal intent, or of any deliberate purpose of encroaching upon the exclusive rights of a sister profession.

So long as the small professional trespasses are of only occasional occurence in the practice of any individual pharmacist, it is probable that they will not result in subjecting him to legal interference; but when such offenses become marked and characteristic of his practice, he is in danger of being regarded as a sort of nuisance that must be suppressed, and of being subjected to a prosecution that could hardly fail to be successful. The fact that the patient knows that the one prescribing for him is not a qualified physician does not affect the rule as to the liability of the latter; and even where the practitioner possesses all educational qualifications necessary to entitle him to practice medicine, and has made his application to a legally constituted board for a certificate, still is he chargeable with a violation of the law if he attempt to practice before such certificate has been actually granted to him, and he would be unable to recover pay for services so rendered.

A pharmacist is not permitted, as the owner, the assignee of the owner, or the vendor of a patent medicine, to inform himself as to the symptoms of a disease and prescribe his medicine as a remedy. It has been repeatedly held that such a method of selling a patented preparation constitutes illegal practice of medicine, and that a person pursuing such a course is not protected by the provisions of a United States patent. On the other hand a vendor of a patent medicine who does not pretend to diagnose disease and determine the proper remedy in a particular case is not a violator of these statutes.

The rule is well established that in all cases of illegal practice of medicine, the person thus violating the law, whether it be so expressed in the statute or not, is not only incapable of recovering for his services, but is thereby deprived of the right to recover pay for medicines so furnished by him. Thus, a pharmacist who yields to the temptation to increase his sales by such illegal means, may be made to suffer the loss of his drugs together with the legitimate labor of compounding them.

In the case entitled Underwood v. Scott, the "practice of medicine" is defined by the court as constituting "First, in judging the nature, character and symptoms of the disease; second, in determining the proper remedy for the disease; third, in giving or prescribing the application of

the remedy to the disease." From this definition with the context of the opinion and the rules laid down in other cases, it seems that the offense of illegal practicing may be complete, although no charge, other than that for the medicines furnished, appears to have been made.

These rules of the law, restricting the practice of medicine, are not intended to apply to any mere neighborly act of kindness in case of sickness, where, without any compensation, one person may endeavor to contribute to the relief of another in distress; nor are they to be construed as applicable to real cases of "emergency." What constitutes a real case of "emergency" is sometimes a very important question in the course of an action at law, and we find in the opinion of the court delivered in "The People v. Lee Wah," that to constitute an "emergency," in a legal sense, the exigency must be of so pressing a character that some kind of action must be taken before a legally qualified physician or surgeon can be found or procured.

In addition to the penalty resulting from a conviction for a misdemeanor and the loss of the price of his services and medicines, there yet remains a danger of a graver kind to threaten the pharmacist who yields to the temptation to exceed the legal limits of his profession and increase his income by the unauthorized practice of medicine. A qualified physician may err in his

judgment in the treatment of a case and serious consequences may result to the patient; but, if the physician has not been guilty of negligence, gross ignorance, or other malpractice, he need fear nothing from either criminal prosecution or civil action. But the case would be widely different with the pharmacist, not qualified to practice medicine, were he to make such a mistake with serious or fatal results. He would be compelled to bear the full weight of the damages and the penalty, in proportion to the gravity of the consequences resulting from his act. If the patient died as the result of such unwarranted interference with a profession for which the offender was not legally qualified, the latter would be subject to conviction for involuntary manslaughter. Nor would the punishment following such a conviction relieve him from civil liability for damages to those aggrieved or injured by the death of the victim.

The several State legislatures have enacted some stringent and salutary rules of penal or criminal kind, intended to prohibit the manufacture, sale, use, mailing, administering, or in any way supplying any medicine, drug, other substance, or instrument for improper or criminal purposes. Such statutes are directed chiefly against miscarriage, abortion, rape, etc., which crimes are classed as felonies and punishable by imprisonment for a term of years. Statutory

rules exist likewise against the adulteration of drugs, and against the willful, negligent, or ignorant omission to label any drug or medicine put up in filling an order or prescription. These latter offenses are classed as misdemeanors, but if death should occur by one of them it would be a felony.

Now, in connection with these penal provisions, it is of special importance to note the tendency of modern rules of law to class as "principals" all persons directly or indirectly concerned in the commission of a crime. A "principal," in criminal law, is said to be "the actor in the commission of a crime;"[1] an "accessory " is one "who is not the chief actor in an offense, nor present at its performance, but is in some way concerned therein, either before or after the fact committed."[2] The old distinction of the common law between principals of the first degree and principals of the second degree, and accessories before the fact, is fading from the statute books. The prevailing theory of the law is now that "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present have advised and encouraged its commission, and all

[1] Bouv. Law Dict.

[2] And. Law Dict.

persons counseling, advising or encouraging children under the age of fourteen years, lunatics, or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crimes so committed." This section of the Penal Code of California expresses, we believe, the prevailing American theory of criminal liability.[1]

1 Sec. 31 P. C. Cal.

## CHAPTER IV.

### THE COMMON LAW RIGHT TO PRACTICE PHARMACY, AND THE REASON FOR STATUTORY RESTRICTIONS ON THE RIGHT.

Under the common law, in the United States and Great Britain, anyone has the right to practice pharmacy. The right to own private property is fundamental, and the right to dispose of it is an incident of ownership; drugs are a species of property capable of private ownership, and are therefore subject to sale as an incident of such ownership. It is likewise incidental to the ownership of private property, that a man may employ his skill to change its form and increase its value, and thereafter exchange it for the price of the combined material and labor; and this represents the chief feature in the practice of pharmacy.

There is nothing in the nature of the drug business to except it from the operation of these general broad principles of the common law, though there is that in the nature and accustomed use of drugs, some of them being dangerous to health and life, which brings them within the operation of other and well established principles of the common law, that seriously affect the liability of one who deals in them.

The common law right of every person desiring to do so, to engage in the practice of pharmacy,

being based upon the natural or absolute rights of personal liberty and private property, it becomes a matter of interest to consider what reasons may exist to justify the making of rules to restrict that right, and how far such rules may extend without amounting to an unjust infringement of the rights referred to. A glance at some of the simpler conditions that alone can insure to the individual the reasonable enjoyment of his rights, at least while human nature is in its present imperfect state, may be of some assistance to the reader. "The right of personal security, the right of personal liberty, and the right of private property," are held by Sir William Blackstone to embrace the natural or absolute rights to which every man is entitled. In a state of nature a man may be supposed to enjoy these rights in an unlimited sense; but this is true in theory only, as his actual enjoyment of any rights whatever in that state is rendered extremely precarious by the fact that another, by superior strength or treachery, may slay, enslave or rob him.

The knowledge that he possessed the right of personal security could have yielded little comfort to the primitive man, while at the same time he was conscious of living in the most terrifying insecurity. Any enthusiasm engendered by the knowledge of possessing the right of personal liberty, might have been chilled by the limitations

thrown around him by a more powerful neighbor, who also possessed the right of personal liberty, together with the power to enforce an unrestricted enjoyment thereof, and was restrained by no regard for the rights of others. His right of private property could have afforded him little consolation, after some enterprising and unscrupulous person had stripped him of its possession and enjoyment. Thus the absolute rights of primitive man proved in many, perhaps most, instances but a bloody heritage of battle with man and beast, in the incessant turmoil of which he passed his life, vainly endeavoring to reduce those abstract rights to a state of present possession and enjoyment.

Liberty, deprived of her proper vestments of law and courtesy, is but a naked savage and often better shunned than courted. The very existence of these absolute rights of man, together with the disposition of most men to enjoy them to the full extent of their opportunities, gives rise to the necessity for rules of equitable justice and restraint. Without such rules, the liberty of the strong would mean the enslavement of the weak, personal security would not abide on earth and the law of private property would be:

"The simple plan,
That they should take who have the power,
And they should keep who can."

Even in a state of savagery, men quickly learn that the best conditions of life possible to them are to be attained only in combination and mutual support; and as the result of this knowledge, out of chaos comes association, organization and government. The individual consents to some restrictions upon his natural rights and liberties that he may be secure in the enjoyment of those that remain to him; and so long as tyranny is excluded from government, and the restraints that are imposed upon individual liberty are necessary, and are framed and enforced in a spirit of equal justice, the individual is greatly profited by what is sometimes termed the "social contract."

Let us suppose that in the wilds of Africa three savages occupy adjoining lands and live apart from all tribal relations. One is a burly fellow and superior, physically, to either of his neighbors, whom, singly, he unscrupulously robs and abuses. Driven to the extremity of endurance by their merciless tormentor, the two make common cause against him and find that, jointly, they are his match. Upon this discovery, they decide to build their huts together and to live upon and cultivate the same patch of ground; and agree that in case of an attack upon either, the other shall go to his aid. This arrangement proves satisfactory so far, and they begin at once to enjoy some liberty of action with a feel-

ing of security and the pleasure of unmolested proprietorship in their land, neither of which had been possible before while living separately at the mercy of their violent neighbor. But, each of the allies being accustomed to following the dictates of his own will, solely, save when deferring to outside force, they soon fall to quarreling with each other. They do not dare to separate and live apart, for their vengeful enemy waits but an opportunity to destroy them singly. The result is that perforce of circumstances they are compelled to adjust their differences and agree to some personal sacrifices for the common good, in order that they may preserve life and liberty. This agreement is their constitution and they have learned their first lesson in civil government. They surrendered some of their lesser rights and privileges in order that they might live in security, exercise their greater liberties, and enjoy their property.

The illustration here used is a passage from the very primer of the science of government, but however great and complex a political organization may become, the simple principles of mutual protection and advantage underlie the whole fabric, and every just and necessary law that is made takes its vital force, directly or indirectly, from them.

It is generally true that the state will permit a person to select and pursue an occupation with-

out legal interference or restraint; provided, always, that he must not undertake to follow any vocation that will be a menace to the public health or safety, or that is opposed to the policy of the government. The rule, "*salus populi suprema lex*," is as strong now as it was in the days of the Roman Republic, and public health, safety and policy are each paramount to the choice of the individual. Upon this principle rests the "police power" of a community and its exercise "with respect to the liberty, safety, health, morals, tranquility, and happiness enjoyed by its members."[1] Justice Field defined "police power" as being: "The power in each State to prescribe regulations to promote the health, peace, morals, education, and good order of the people."[2] The same great jurist, in indicating the constitutional boundaries which limit the exercise of their police power by the several States of the Union, said: "Legislation which secures to all protection in their rights, and the equal use and enjoyment of their property, embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community, comes within its scope; and every one must use his property subject to the restrictions which such legislation imposes. The police power of the

[1] And. Dict. of Law.

[2] Barbier v. Connolly. 113 U. S. 31, 5 Sup. Ct. Rep. 357, 28 L. Ed. 923, 10 U. S. Notes 947.

State can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, as far as may be required to secure these objects."[1]

Laws of the class under consideration, regulating and restricting the practice of certain occupations and professions, are established and maintained in various forms in most civilized countries. Though appearing only in the higher stages of civilization and regarded as the outgrowth of an artificial state of society, they are, nevertheless, founded upon the natural and primitive right of personal security. Their presence is a manifestation of the efficient power of united mankind, exerted for the security of each individual, by sacrificing the immediate and selfish interests of a few to the permanent and substantial interests of all.

The legislative idea of public good is truer than that of the individual, to the extent that private interests are eliminated therefrom. The average citizen would promote the general welfare by cheerfully restricting the private enterprises of his neighbor, wherever they might seem to be detrimental to the public good; but would be slow to impose a check upon his own prosperity in pursuance of the same beneficent principle. In a legislative body, a majority may generally be

[1] Munn v. Illinois. 94 U. S. 145, 24 L. Ed. 77, 9 U. S. Notes 21

found who are willing to work for what seems to them to be the highest good of the people; for it is not an easy matter to coerce or induce so considerable a number of men to act in unison for the furtherance of the merely selfish ends of any one person or company of persons.

It is doubtless true, however, that the origin of very few statutes can be traced to purely disinterested sources. The subjects which engage the attention of legislatures are agitated primarily, as a rule, either by those whose sole purpose is to use this department of government to advance their private interests or by those who are moved to active exertion in a matter, by the expectation of incidentally deriving some material personal advantage from the passage of the act desired. From the many subjects thus proposed for legislation, it remains for the legislators to determine which of them, if any, involve the real interests of the people in such a way as to require the making of additional laws.

The passage of laws restricting and regulating the practice of a particular profession, like pharmacy, medicine, or dentistry, is generally urged by the members of the profession, themselves, with the laudable purpose of raising its standard of proficiency, and placing it upon a higher and more exclusive plane of operation; their chief aim being to promote the growth and dignity of their profession, and incidentally to share in the

general prosperity resulting therefrom. But when the subject has once been brought to the attention of the legislators, it is viewed and discussed from a standpoint widely removed from that occupied by the members of the profession. With the latter, the advancement of their profession is the central and moving thought, and the good of the public follows as a resulting benefit; while with the former, the public good must be the controlling consideration, to which the benefit conferred upon the particular profession is incidental.

Tried by the rule just stated, laws restricting and regulating the practice of pharmacy have generally met with favor, both from legislators and from the public at large, for the reason that such laws are founded upon principles of sound policy and are directed to the substantial good of the people. As before intimated, laws of this nature are based upon the principle of personal security or self preservation; and wherever a vocation, or even a single act, is of such a nature as to be attended with conditions of peculiar or unusual risk or danger to the health, reputation or life of one liable to be affected by it, a person engaged in the vocation or doing the act is held to a responsibility, strict in proportion to the risk or danger. Such has ever been the policy of the unwritten or common law, and at various times statutes have been enacted in aid of that policy;

but it remained for modern jurisprudence to adopt measures which operate in the interests of scientific proficiency while at the same time tending, by preventive means, to reduce the danger. The wisdom of the method is, we think, beyond question in an enlightened age, and to maintain laws of this nature is a public duty of the highest order; while the omission to provide for the protection of the community against dangers so apparent, in a dull reliance upon common law remedies for irremediable injuries, invites a charge of criminal negligence or imbecility.

No matter with what degree of strictness the common law rules of liability may be applied to him who deals in substances of a dangerous nature, these rules should be relied upon only after every means has been used to prevent any occasion for invoking them. There are some things for which damages are totally inadequate as a remedy, and there are cases in which even that insufficient remedy cannot be obtained owing to the poverty of the offender. The true policy of the law is to reduce to a minimum the opportunities for the dangerous and deadly mistakes to which a profession like pharmacy is peculiarly exposed, and which menace the security of those who are obliged to trust their health and even their lives to the knowledge and skill of its members.

Of course, a law that specifically restricts the practice of a particular profession to those who possess a certain standard of educational qualifications and general fitness, will challenge and encounter the violent opposition of those who are incapable of meeting its requirements; but this opposition needs not to be met by argument, since it bears in itself the seeds of its own destruction. When an unqualified, would-be practitioner is found expending his energies in protesting against and trying to evade the provisions of a law framed to elevate the profession of his choice, instead of proceeding promptly to put himself in harmony with so commendable and progressive a movement, he evinces a fatal want of either capacity or honest purpose to give to society the best professional services of which he is capable. In fact, he is the very man against whom the law is designed to protect the community.

We may say in concluding this chapter and as a summary of its contents, that from a study of the common law, it appears that under its principles any person is at liberty to engage in the sale of drugs as freely as in any other branch of the mercantile business; and that he may even pursue the practice of pharmacy in its more technical application to the dispensing of medicines, etc., with the same freedom as that with which he might engage in any other lawful occupation.

But it seems also, that owing to the dangerous character of many drugs in their relation to the health and lives of those who may use them, the dealer, whether as merchant or pharmacist, bears a weight of legal responsibility, great in a degree corresponding to the danger involved.

It appears that the statutory provisions for restricting and regulating the practice of pharmacy are based upon the principles of personal security or self preservation; that the immediate reasons for applying the principles in this case are, that the practice of this profession involves the selling and compounding of substances dangerous to the health and lives of citizens; that from the unfamiliar character of those substances, the buyer is unable to judge of their nature or quality, and obliged to trust entirely to the knowledge, skill, and care of the pharmacist; that public health and safety require that the latter shall attain to a certain proper degree of education and training to fit him for his responsible duties; that the remedies afforded by the common law for injuries occasioned by ignorance, unskilfulness or neglect on the part of a pharmacist, are wholly inadequate; and that these statutory provisions are adapted to reduce to a minimum the dangers referred to herein, and to insure a high degree of excellence in a profession second only to medicine in its influence upon the health and lives of the people. Yet,

with so strong an array of reasons for the maintenance and further development of these measures, it is none the less to be remembered that the State may "interfere with the conduct of individuals in their intercourse with each other, and in the use of their property," only so far as may be required to secure "the peace, good order, morals and health of the community." The delicate balance between personal security and personal liberty must be wisely adjusted and firmly maintained.

## CHAPTER V.

### QUALIFICATIONS OF PHARMACIST AND STATUTORY REGULATIONS.

When we speak of the qualifications of the pharmacist in this connection, we mean those which the law requires him to possess. A man who "holds himself out to the community" as being fitted to do certain things that require scientific knowledge and skill, with a fair degree of care and judgment, and offers his services to that end, assumes certain obligations that the law will hold him responsible for. Every member of the community who avails himself of the services of such a man, is entitled to expect from him that he will exercise on his behalf a reasonable or ordinary degree of such knowledge, skill, care and judgment.

The general principle here stated has special significance when applied to a profession like pharmacy, which so closely concerns the lives and health of the people. Moreover, the average citizen would be quite helpless in the matter of determining the kind or quality of a drug bought by him or used in a prescription compounded by him. He is simply at the mercy of the pharmacist; and the law gives him the right to rely absolutely upon the skill and judgment of the man who sells him the drug or prepares the prescription. For this reason it is judicially established

concerning the pharmacist, that "It is his duty to know the properties of his drugs, and to be able to distinguish them from each other. It is his duty so to qualify himself to attend to the business of compounding and vending medicines and drugs, as that one drug may not be sold for another; and so that when a prescription is presented to be made up, the proper medicines, and none other, be used in mixing and compounding it."

Not only must he who chooses this profession qualify himself thoroughly for the discharge of its responsible duties, before entering upon its practice, but he must maintain himself abreast of the times in all that pertains to pharmaceutical knowledge as applied in modern practice. In all legal issues—contests growing out of charges of negligence, unskilfulness, or other malpractice—that may arise in the pharmacist's career, he will be judged by the authorities and standards of his profession.

The law does not require the pharmacist to possess a degree of knowledge and skill equal to that of the most advanced members of his vocation, but is inexorable in its demand that he shall have and use in his practice at least ordinary knowledge and skill.

The principle here stated is of the general law and entirely independent of all statutory provisions. The fact that a man holds a license to

practice pharmacy under the statute, in a state where the practice of pharmacy is regulated by statute, does not in any sense exempt him from the force and effect of this general, fundamental principle as to his qualifications. Neither actual ignorance nor negligence may shield itself behind the theoretical proficiency suggested by a license.

In most of the states of the Union statutes have been enacted to regulate the practice of pharmacy. Of course these laws are of force only within the boundaries or jurisdiction of the particular state that passes them, and pharmacists and lawyers must acquaint themselves with the statutory provisions on this subject of their own states respectively.

Such statutes generally provide, in effect, that "it shall be unlawful for any person to manufacture, compound, sell, or dispense any drug, poison, medicine or chemical for medicinal use, or to dispense or compound any prescription of a medical practitioner unless such person be a registered pharmacist or a registered assistant pharmacist, etc."[1] They then proceed to define "registered pharmacist" and "registered assistant pharmacist" and to fix the legal status of each, relative to the profession. Their fitness or qualifications, from a theoretical point of view, being determined either upon actual examination or

[1] Statutes of California, 1901, P. 299. State v. Workman, 75 Mo. App. 454.

the presentation of satisfactory credentials; but a certain number of years of actual experience in drug stores where the prescriptions of physicians are prepared is made the *sine qua non* in the qualifications of both registered pharmacist and registered assistant pharmacist.

Provision is made for the appointment of a Board or Commission of Pharmacy, with power to transact all business pertaining to the legal regulations of the practice of pharmacy; to cause the prosecution of any who violate these laws, and to examine and register as pharmacists or assistant pharmacists all applicants whom it shall deem qualified to be such, respectively.

All applicants for examination or registration are required to pay a certain fee to the secretary, who, in turn, must furnish with a certificate, signed by the secretary and by the examiners, each one who passes the examination.

A book is kept in which are registered all pharmacists and assistant pharmacists who are deemed qualified to practice under the statute.

These statutes embrace stringent rules against the substitution, adulteration, or deterioration or alteration in any manner of any drug, or the selling of any drug when so deteriorated or altered. They require the pharmacist to file all physicians' prescriptions and to keep them so filed for a specified time; also, to furnish a copy thereof at the order of the prescribing physician.

This rule as to prescriptions serves an important purpose in providing a record to aid in fixing the responsibility for mistakes. It is an invaluable protection to the pharmacist, in any case where he may be charged with a mistake for which some physician may really be responsible.

Not less stringent are the rules provided to govern the sale of all poisonous drugs. All such are to be labeled with the name of the article and the word "poison," and the name and place of business of the seller. In the case of some of these drugs, specified in a certain schedule, every sale must be entered in a book kept for that purpose; the entry giving the date of sale, the name and address of the purchaser, the name and quantity of the poison sold, the purpose for which it is stated by the purchaser to be required, and the name of the dispenser. It is made unlawful for a druggist to sell any poison listed under the statute, unless on inquiry it is found that the person is aware of its poisonous character, and that it is to be used for a legitimate purpose. Reasonable exceptions are made to these rules, in cases of physicians' prescriptions, and where the package sold does not contain more than an ordinary dose.

These wise limitations on the sale of poisonous drugs have a tendency to reduce mistakes and accidents to the minimum; and to serve as at least some slight check upon crime, while mater-

ially aiding in fixing the responsibility for mistakes, and in detecting some of the mistakes which they cannot prevent.

The violation of any provision of these statutes is made a misdemeanor, punishable by fine and imprisonment.

Since the courts are gradually developing a body of pharmacal law in their decisions under these several statutes, it will be useful to here note the present trend of judicial action along these lines, by referring to a few instances. In New York, the provision of the public health law, prohibiting the practice of pharmacy without a license, does not apply to the sale of the usual domestic remedies by retail dealers in the "rural districts." The statute provides an exception in favor of these "usual domestic remedies." In the interpretation of this exception, the court held that it does not protect an unlicensed dealer in a village of 12,000 inhabitants; "rural districts" being defined by the statute to mean "small villages and country districts having no store where pharmacy is practiced." Westchester County v. Dressner, 48 N. Y. Supp. 953, 23 App. Div. 215.

Under the Illinois statute, permitting the sale of "domestic remedies" without license, the question whether iodine and quinine are such remedies was held to be for the jury. People v. Fisher, 83 Ill. App. 114.

Where one has been sued for compounding a prescription, he not having a license to practice pharmacy, and alleges in his defense that he is a legally qualified physician, the burden of proving the allegation rests upon him. Suffolk Co. v. Shaw, 47 N. Y. Supp. 349, 21 App. 146.

The provision of the statute requiring the pharmacist to label the poisons sold or dispensed by him does not apply to the prescriptions of physicians. Wise v. Morgan, 45 S. W. 971.

Where the law requires that every pharmacy shall be in charge of a legally qualified pharmacist, the provision is not satisfied by showing that the owner employs such a pharmacist, when it appears that the latter resides at another town and is present at the store only two or three times a week. State v. Jordan, 87 Mo. App. 420.

The sale of intoxicating liquors by the druggist is a matter to which the attention of the courts has been frequently called. It has been held that to protect a druggist in selling intoxicating liquors, the prescription must be preserved as the statute prescribes. State v. Davis, 76 Mo. App. 586.

Under Rev. St., C. 28, par. 5, authorizing druggists to keep all medicines and poisons authorized by the U. S. dispensary as of recognized medicinal utility, intoxicating liquors are included. Pollard v. Allen, 96 Me. 455, 52 Atl. 924.

Under the statute prohibiting the selling, with-

out license, of intoxicating liquors, the sale of medicinal preparations containing such a percentage of alcohol that, if drunk to excess, it will produce intoxication, is unlawful. Colwell v. State, 37 S. E. 129; 112 Ga. 75; Johnson v. State, 66 S. W. (Tex. Crim.) 552.

In a district where a special local option law is in force, a druggist cannot obtain a license to sell liquor, unless the law contains an exception in favor of druggists. Eastham v. Commonwealth, 20 Ky. Law Rep. 1639, 49 S. W. 795; (1899); Storms v. Commonwealth, 105 Ky. 619, 49 S. W. 451; 20 Ky. Law Rep. 1434; Commonwealth v. Powell, 62 S. W. 19; 22 Ky. Law Rep. 1932.

It is also held that where a local option law is in force, a license to sell "pure alcohol" does not protect a druggist in the "sale of rye whiskey."

It has been decided that under the law authorizing the recovery of a penalty for every violation of the act by practicing without a license, there may be a recovery of accumulated penalties. Suffolk Co. v. Shaw, 47 N. Y. Supp. 349, 21 App. Div. 146.

It is interesting to note that, when one has been acquitted in a prosecution for the alleged violation of any provisions of these acts regulating the practice of pharmacy, no appeal lies by the people. It comes under the general provision as to criminal cases. People v. York Co., 80 Ill. App. 162.

## CHAPTER VI.

### CONSTITUTIONALITY OF LAWS REGULATING THE PRACTICE OF PHARMACY.

When the Thirteen American colonies renounced their allegiance to Great Britain and established their independence, the political status of each was that of an independent, sovereign state or nation, possessing legal capacity for the exercise of the full powers of sovereignty as of inherent right. Chief Justice Black, in the opinion delivered by him in a leading Pennsylvania case, said "In the beginning the people held in their own hands all the power of an absolute government. The transcendent powers of Parliament devolved on them by the revolution; (Bonaparte v. Camden etc. R. R. Co. 1 Bald. 220; Fed. Cases No. 1617; Johnson v. McIntosh, 8 Wheat 584; 5 L. Ed. 681, 2 U. S. Notes 201; Wilkinson v. Leland, 2 Pet. 656; 7 L. Ed. 542; 2 U. S. Notes 883.) Antecedent to the adoption of the federal constitution, the power of the state was supreme and unlimited (Farmers & Mechanics Bank vs. Smith, 3 Serg. & R. 68; 6 Wheat 131, 5 L. Ed. 224, 2 U. S. Notes 65.) If the people of Pennsylvania had given all the authority which they themselves possessed, to a single person, they would have created a despotism as absolute in its control over life, liberty, and property, as that of the Russian autocrat. But they dele-

gated a portion of it to the United States, specifying what they gave, and withholding the rest. The powers not given to the government of the Union were bestowed on the government of the state, with certain limitations and exceptions, expressly set down in the state constitution. The federal constitution confers powers particularly enumerated; that of the state contains a general grant of all powers not excepted. The construction of the former instrument is strict against those who claim under it; the interpretation of the latter is strict against those who stand upon the exceptions, and liberal in favor of the government itself. The federal government can do nothing but what is authorized expressly or by clear implication; the state may do whatever is not prohibited."[1] The principles so clearly stated in this opinion are applicable with equal force to each and every state in the Union, and present in brief form the plan upon which the rights or powers, originally residing in the people, have been divided between the three parties to the great compact—the people, the State and the Union.

First, for mutual protection and advantage, the thirteen new States entered into a coalition based upon the Articles of Confederation, and finally, upon the present Constitution of the United States, they proceeded "to form a more

[1] Sharpless v. Mayor of Philadelphia, 21 Pa. St. 160-164, 2 Am. Law Reg. 29, 85; 59 Am. Dec. 759 and note.

perfect Union," which resulted in the permanent establishing of our present system of government.

This "more perfect Union," has now gone into history as a sovereign nation, complete and indissoluble, and the theory of a confederate body of independent states, as applicable thereto, has become practically obsolete. It must not be forgotten, however, that the sphere of sovereignty enjoyed by the federal government is limited by what is expressed or implied in the Constitution, and that the Constitution is a grant of powers from the people of the States, and "whatever is not conferred is withheld and belongs to the several States or to the people thereof."[1] This thought is worthy of reiteration, and should be kept uppermost in the mind while pursuing an inquiry as to the constitutional status of any Congressional or legislative act. As indicated by the cases herewith cited, as well as by numerous others reported, the principle stated lay for more than half a century directly in the line of constitutional litigation. It was thus first carved out by consummate judicial reasoning, before being finally placed beyond discussion on simple constitutional principles, by being incor-

[1] Calder v. Bull, 3 Dall. 386; 1 L. Ed. 648, 1 U. S. Notes 57; Gibbon v. Odgen, 9 Wheat. 1, 187; 6 L. Ed. 23, 2 U. S. Notes 213; Briscoe v. Bank of Kentucky, 11 Pet. 257; 9 L. Ed 709, 3 U. S. Notes 675; Gilman v. Philadelphia, 3 Wall. 713; 18 L. Ed. 96, 6 U. S. Notes 556; U. S. v. Cruikshank, 92 U. S. 542-550, 23 L. Ed. 588, 8 U. S. Notes 837.

porated as an amendment into the Constitution itself. This amendment declares that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[1]

It is apparent from the principles just stated that although the laws of the United States are supreme, and paramount to the state laws, yet it is only upon certain subjects, designated by the Constitution, that the federal government has authority to make any laws at all; while each state is to be considered as possessing the unlimited rights or powers of sovereignty, except as to those powers that have been either specially conferred upon the United States, or reserved by the State constitution to the people of the State themselves. It follows from these conditions that every law passed by a State of the Union must be presumed to be constitutional unless the contrary clearly appears. "To justify a court in pronouncing an act unconstitutional, in whole or in part, it must be able to vouch some exception or prohibition clearly expressed or necessarily implied. To doubt is to favor constitutionality." "That meaning of words is to be taken which will support the statute."[2] Also, "A separate portion of an act may be unconsti-

[1] Const. of U. S. Tenth Amend.

[2] Commonwealth v. Butler, 99 Pa. St. 540; State v. Hipp, 38 Ohio St. 219.

tutional, and the rest be valid, provided the law as a whole can be executed."[1] "The rule is to enforce statutes as far as they are constitutionally made, rejecting those provisions only which show an excess of authority, etc."[2]

With regard to the different kinds of unconstitutional laws, Justice Woodward said, "A law that is unconstitutional is so because it is either an assumption of power not legislative in its nature, or because it is inconsistent with some provision of the federal or state constitution."[3] The legislative branch of the government, whether state or national, must keep within its own proper sphere of action and must not under any circumstances trench upon the duties and powers vested in the executive and judicial departments; for this would be "an assumption of power not legislative."

Article VI of the Constitution of the United States proclaims that, "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution and

[1] United States v. Reese, 92 U. S. 221, 23 L. Ed. 563, 8 U. S. Notes 787; Presser v. Illinois, 116 U. S. 263, 6 Sup. Ct. Rep. 580, 29 L. Ed. 615, 11 U. S. Notes 27.

[2] Adler v. Whitbeck, 44 Ohio St. 575, 9 N. E. 672; Reid v. Morton, 119 Ill., 118, 129, 6 N. E. 414.

[3] Commonwealth v. Maxwell, 27 Pa. St. 456.

laws of any State to the contrary notwithstanding." This is a bold and unequivocal proclamation of supremacy on the part of the Constitution. It associates with itself on the plane of supremacy the laws and the treaties of the United States, but in doing so, distinctly affixes a condition which effectually subjects them to its own sovereignty. It is the laws "made in pursuance thereof" and the treaties "made under the authority of the United States" that are a part of the supreme law of the land. Any law not made in pursuance of the Constitution, and any treaty not made under the authority conferred by it upon the United States would, of course, be unconstitutional and void.[1] So also would be "anything in the Constitution and laws of any State to the contrary" of this or of any other section or provision of the Constitution of the United States; as, in fact, would be any State law if repugnant to any part of the "Supreme Law." "The United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude

[1] Ableman v. Booth, 21 How. 506–520, 16 L. Ed. 169, 5 U. S. Notes 885; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588, 8 U. S. Notes 837; United States v. Harris, 106 U. S. 629, 1 Sup. Ct. Rep. 609, 27 L. Ed. 290, 10 U. S. Notes 430; Civil Rights cases, 109 U. S. 3, 3 Sup. Ct. Rep. 18, 27 L. Ed. 835, 10 U. S. Notes 594.

it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which the instrument has committed to it."[1]

In determining the validity of a law of a given State with regard to the constitution of the State itself, it is, as we have seen, necessary to proceed upon a theory different from that adopted in the case of a United States' law. With regard to the latter, assuming that the power exercised is legislative in its nature, it must be determined whether that power is embraced within those conferred upon Congress by the Constitution; while with the former, starting with the same assumption, it must be determined whether the power exercised has either been conferred upon the federal government, by the people, or has been prohibited to the legislature by the State constitution, and if neither has been done the law will stand. This difference arises from the fact that State constitutions, unlike that of the United States, are framed upon a basis of unlimited power, and thereupon proceed to lay down certain exceptions which are embraced in the powers conferred upon the federal government and those reserved to the people of the State.

It has been stated, in a former chapter, that the laws enacted by the several States for regu-

[1] Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648, 9 U. S. Notes 823.

lating the practice of pharmacy are of the class denominated police regulations, and result from the exercise of what is termed the police power of the State. In their nature, they are identical with the statutory rules framed to regulate the practice of medicine, and dentistry, respectively, and with numerous other laws directed to the preservation of the public health, safety, morals, etc. If, therefore, on principle, the laws applicable to the profession of pharmacy are unconstitutional, it must follow that those relating to the two other professions referred to are likewise so. Nor would the matter end here, if followed up by a series of uniform and consistent adjudications; but condemnation would fall upon all laws relating to the public health and morals, or assuming to regulate such dangerous occupations as are deemed a menace to public safety, until the whole internal policy of the State would be effectually wiped out. It is true, however, that a State, in the exercise of its police power, may interfere with the occupations and mutual dealings of its citizens only to the extent necessary to preserve the peace, good order, morals and health of the community; and many who admit the soundness of the general proposition that the State possesses this power, will, nevertheless, oppose its exercise in some specific case, on the ground that the particular rule objected to is beyond the purview of the principle, and infringes

upon the rights intended to be reserved by the people.

From the principles stated above, it may be said of any State law that it is constitutional, if the power exercised in its enactment is legislative in its nature, and is not among those conferred upon the federal government by the Constitution of the United States, nor among those reserved to the people by the State constitution.

Dent v. West Virginia (129 U. S. 114, 9 Supp. Ct. Rep. 231, 32 L. Ed. 623, 11 U. S. Notes 684) is a typical and leading case among those which have arisen out of the laws under consideration. It involves the validity of the statute of West Virginia "which requires every practitioner of medicine in it to obtain a certificate from the State Board of Health that he is a graduate of a reputable Medical College in the school of medicine to which he belongs." Although this case arose under the statute regulating the practice of medicine, yet the constitutional questions raised are exactly the same as those which arise in the consideration of cases under the prevailing statutes relating to pharmacy.

In this case it was urged on behalf of the defendant physician, "that this statute by forfeiting his right to continue in the practice of his profession: (1) destroys his vested rights and deprives him of the estate he has acquired in his profession by years of study, practice, diligence

and attention: (2) deprives him of the benefit of an established reputation as a practitioner: (3) depreciates, destroys, and hence deprives him of the value of his invested capital in books, medicines and instruments." Upon this showing as to loss of valuable property interests, counsel maintained that the statute was repugnant to the clause of the Fourteenth Amendment to the Constitution of the United States, which declares that no State shall deprive any person of life, liberty, or property without due process of law.

Mr. Justice Field presented the opinion of the Court, in the course of which he said, "Here all vocations are open to every one on like conditions." "The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right when its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. The power of the State to provide for the general welfare of the people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the

practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subject, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the profession or calling, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty."

"It is sufficient for the purpose of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is by process or proceedings adapted to the nature of the case."

"There is nothing of an arbitrary character in the provisions of the statute in question; it applies to all physicians, except those who may be called for a special case from another State; it

imposes no condition which cannot be readily met, and it is made enforceable in the mode usual in kindred matters, that is, by regular proceedings adapted to the case. It authorizes an examination of the applicant by the Board of Health, as to his qualifications when he has no evidence of them in the diploma of a reputable medical college in the school of medicine to which he belongs, or has not practiced in the State a designated period before March, 1887."[1]

These extracts from the opinion rendered in Dent vs. West Virginia possess the clearness, simplicity, and scientific directness that are wont to characterize the expressions of the great jurist who wrote them; and the principles therein outlined are admirably expressive of the constitutional status of the laws under discussion.

In a Minnesota case arising under the statutes of that State regulating the practice of dentistry, the court declares that the power of legislatures to prescribe reasonable conditions, upon which professions may be practiced, rests upon the right to protect the public from injurious consequences likely to result from allowing persons to practice those professions, who do not possess qualifica-

[1] Dent v. West Virginia 129 U. S. 114, 9 Sup. Ct. Rep. 231, 32 L. Ed. 623, 11 U. S. Notes 684; see also Eastman v. State, 109 Ind. 278, 58 Am. Rep. 400, 10 N. E. 97; Orr v. Meek, 111 Ind. 40, 11 N. E. 787; Brown v. People, 11 Colo. 109, 17 Pac. 104; State v. Creditor, 44 Kan. 565, 21 Am. St. Rep. 306, 24 Pac. 346; Limitations on Public Power, Tiedman, Sec. 87; Hewitt v. Charier, 16 Pick. 353; Spaulding v. Alford, 1 Pick. 33; Wright v. Lanckton, 19 Pick. 288; Cooly Const. Lim. 745.

tions essential to the safety of those who employ them. In rendering his opinion, the judge said "That, in the exercise of that power, the legislature may require, as a condition of the right to practice, that the person shall procure a license; may designate some office or board to issue a license, and to determine whether an applicant possesses the qualifications required to entitle him to it; and may prescribe, so far as can be done by a general law, what qualifications shall be required, and how the possession of them by the applicant shall be ascertained, necessarily follows from the power itself."[1]

This Minnesota case was ended in the State courts, and it does not appear from the opinion whether it was contested on the ground of repugnance to the constitution of the United States or on the theory that the act of the legislature was an exercise of power which had not been granted to the State but was reserved to the people themselves.

An Indiana case, decided in 1887, reaffirms, in general, the doctrine laid down by Mr. Justice Field in Dent v. West Virginia, and deals specially with the matter of exceptions, occurring in some States, to the general operation of the statutes. To the general provision requiring physicians to procure a license, etc., an exception in favor of those who had practiced medicine a des-

1 State v. Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119.

ignated number of years, prior to the passage of the act, was held to be constitutional. The defendant had claimed that the exception was a grant of special privileges and immunities to citizens, and therefore repugnant to the Constitution. The language of the court, upholding the authority of the legislature to exercise its judgment in this regard, was broad enough to include the usual exceptions attending statutes of this class. Hence it may be stated generally, that so long as these exceptions are not arbitrary in their nature, but, like the statutes themselves, operate upon uniform principles wholly consistent with the purpose of the act, and are applied alike to all persons of the class or classes described in them, they are not to be deemed unconstitutional.[1]

The New Hampshire case, entitled "State v. Forcier" (65 N. H. 42, 17 Atl. 577) was prosecuted under the laws of that State for regulating the practice of pharmacy.

Justice Clark delivered the opinion of the court, in the course of which he said, "The constitutional authority of the legislature, in the exercise of the police power of the State to enact such regulations as are deemed reasonably necessary

[1] State v. Donaldson, 41 Minn. 74, 42 N. W. 781; State v. Green, 112 Ind. 462, 14 N. E. 352; ex parte Spinney, 10 Nev. 323; Fox v. Territory, 2 Wash. Terr. 297, 5 Pac. 603, 5 West Coast Rep. 339; State v. Hathaway, 115 Mo. 36, 21 S. W. 1081; People v. Phippin, 70 Mich. 6, 37 N. W. 888; Noel v. People, 187 Ill. 587, 79 Am. St. Rep. 238, 58 N. E. 616.

for the security and protection of the lives and health of all persons within the State, is unquestioned."[1]

As to the fee demanded by the Board of Commissioners of Pharmacy he said, "The fee of five dollars to be paid by the applicant for a license to engage in the business of an apothecary and druggist, is merely an equivalent for the service rendered by the commissioners in making the examination and issuing the license and cannot be considered as a tax upon the business, or as depriving the applicant of his property without due process of law."[2]

In "State of Minnesota v. Donaldson, and another," cited before, it was held that the sale of borax, not medicinally, was not a violation of the statute of that State regulating the practice of pharmacy, and to that end prohibiting the sale of "drugs, medicines, or poisons," by any other than a duly qualified and licensed member of the profession. In this case we find a judicial interpretation of the words "drugs, medicines, and poisons," as used in the Minnesota statute. In the opinion of the court, their meaning includes only "articles whose primary and principal use

1 State v. Donaldson, 41 Minn. 74, 42 N. W. 781; State v. Green, 112 Ind. 462, 14 N. E. 352; ex parte Spinney, 10 Nev. 323; Fox v. Territory, 2 Wash. Terr. 297, 5 Pac. 603, 5 West Coast Rep. 339; State v. Hathaway, 115 Mo. 36, 21 S. W. 1081; People v. Phippin, 70 Mich. 6, 37 N. W. 888.

2 State v. Forcier, 65 N. H. 42, 17 Atl. 577; Pierce v. State, 13 N. H. 536-78; State v. Freeman, 38 N. H. 426; State v. Marshall, 64 N. H. 549, 15 Atl. 210.

is medicinal, or which are commonly understood as medicines; or, at least, if it is to be extended to any other articles, it must be limited to cases where they are prepared and sold for medicinal purposes." In the same case the court declares that the expression "practice of pharmacy," as used in the title of the act, is not to be construed technically and as referring simply to the scientific compounding and dispensing of medicines, but must be understood to include the commercial aspect of the business in the sale of the "drugs, medicines, and poisons," referred to in the body of the statute; and says, further, that the fact that the sale of the articles named is not referred to in the title does not invalidate the provision as set forth in the body of the act. The terms employed in the expression "practice of pharmacy" are sufficiently comprehensive to embrace the entire usual field of operations included in the business of the modern druggist.[1]

In the case of "People v. Moorman," decided in Michigan in 1891, the defendant attacked the validity of the Michigan statute of 1885 for regulating the practice of pharmacy, under which he was being prosecuted, on the ground that its provisions interfered with his vested right, as a physician, to compound medicines, etc. The court held that under that statute, which was

[1] Smith v. Alabama, 124 U. S. 465-80, 8 Sup. Ct. Rep. 564, 31 L. Ed. 508, 11 U. S. Notes 483; Railway Co. v. Alabama, 128 U. S. 96, Sup. Ct. Rep. 28, 32 L. Ed. 352, 11 U. S. Notes 621.

designed to restrict the practice of pharmacy to those only who were properly qualified and licensed, a physician "has no more right than any other person to step into a drug store, and to compound or sell drugs, medicines, to one not his patient." It was also contended on behalf of the defendant that the law conferred upon the board of pharmacy an arbitrary power to collect fees. The part of the statute involved in this point declares "The said board may grant under such rules and regulations as it may deem proper, at a fee not exceeding one dollar, the certificate of registered assistant to clerks or assistants in pharmacy not less than 18 years of age." It was held that the language of the section does not authorize the board "to fix fees arbitrarily, and to make a distinction between different individuals."

As to both of these particular features of the statute, against which the attack was directed, its constitutionality was upheld. On another point, however, the statute did not meet with unqualified judicial endorsement. The defendant maintained that the amendment of 1887, providing that no person shall vend patent or proprietary medicines by retail, unless he has been in the business of vending and retailing such medicines for three years or more, was invalid. His objection thereto was urged upon the grounds that "it grants a monopoly to a favored few and

for no adequate reason; and that it is also an object in the law not embraced in the title, which reads, "An act to regulate the practice of pharmacy in the State of Michigan." The court admitted the force of the argument, but, not deeming it essential to the case to decide the point, it left the matter unsettled.[1]

The provision last discussed seems open to the charge of being outside of the true scope of the police power of the State, and therefore an unwarranted and unconstitutional interference with the liberty of the citizen. The reason that justifies the rest of the statute seems to fail with regard to the part under consideration. Such a restriction upon the power to vend proprietary medicines, the mere sale of which requires no special care or skill as a safeguard to the community, appears to lack the vital element which alone can excuse the State for interfering "with the conduct of individuals in their intercourse with each other, and in the use of their property." That element, in this case, would be the necessity or State obligation to protect the health of the community; and if the rule cannot be defended upon this principle, it ought to be declared unconstitutional, and such would probably have been its fate had the court found it necessary to pass upon it.

[1] People v. Moorman, 86 Mich. 433, 49 N. W. 263, 9 Sup. Ct. Rep. 28, 32 L. Ed, 352, 11 U. S. Notes 621.

In a Missouri case, a question was raised as to the validity of a legislative act which conferred upon a board of health the power to judge applicants to practice medicine, as to their moral character as well as to their literary and scientific attainments. It was contended that such a power was of a quasi-judicial nature, and that the exercise thereof by a board of health was repugnant to the constitution. The opinion of Mr. Justice Gantt in this case presents a learned discussion of the question and sustains the validity of the act.[1] Since boards of health, medical boards, and boards of pharmacy perform duties somewhat similar in this respect, the principle is of very general application with regard to this class of statutes.

It will be apparent from the decisions cited in this chapter, that the general question, as to whether the laws regulating the practice of pharmacy in the different States of the Union are constitutional, has been answered by the courts in the affirmative. The statutes of the several States, on this subject, have been intended to accomplish the same purpose in each, and they agree in their main features; therefore, except in a few isolated cases where some special feature of the law, peculiar to some particular State, has been the point under examination, the decisions of the tribunals of the different States, with re-

[1] State v. Hathaway, 115 Mo. 36, 21 S. W. 1081.

gard to the constitutional status of these laws, are available as authority throughout all.

It may be received as settled, that the legislatures of the different States have authority to enact laws, of uniform operation, regulating the practice of pharmacy within their several jurisdictions. In pursuance of this authority, the State may declare that no person shall engage in the practice of this particular calling, without being first duly licensed thereto, and may fix the terms upon which such license may be obtained. To this end it may designate what degree of skill and learning shall be required of the licentiate, and may create or provide for the creation of a board of pharmacy, among whose duties shall be that of examining applicants for admission to the profession. It may likewise authorize such board to collect a fee from each applicant, which fee "is merely an equivalent for the service rendered by the commission in making the examination and issuing the license, and cannot be considered as a tax upon the business, or as depriving the applicant of his property without due process of law."

We find that the terms "drugs, medicines, and poisons," as used in statutes regulating the practice of pharmacy, have been held to mean "articles whose primary and principal use is medicinal, or which are commonly understood as medicines;" or, if the meaning is to be extended to

other articles, "it must be limited to cases where they are prepared and sold for medicinal purposes."

"Practice of Pharmacy," in the title of one of these statutes, is held to include not simply the compounding and dispensing of medicines, but to embrace, also, "the commercial aspect of the business in the sale of the 'drugs, medicines, and poisons' referred to in the body of the statute." In fact, they express the entire usual field of operations included in the business of the modern druggist.

In regard to a physician's status relative to the practice of pharmacy, it has been decided that he "has no more right than any other person to step into a drug store, and to compound or sell drugs, medicines, or poisons to one not his patient."

The courts have upheld the authority of the legislature to make exceptions to the general rules embraced in these statutes, so long as such exceptions have not been arbitrary in their nature, but have operated upon uniform principles, consistent with the purposes of the general statutes.

It will be apparent from the decisions referred to in this chapter, that the courts will uniformly sustain "the constitutional authority of the legislature, in the exercise of the police power of the State to enact such regulations as are reasonably necessary for the security and protection of

the lives and health of all persons within the State." Nevertheless, each new provision in this class of laws will probably be contested by those who are unfriendly to such restrictive regulations; and occasionally the judicial pruning knife will be applied to cut away some development that shall be deemed repugnant to the constitution.

## CHAPTER VII.

### LICENSE UNDER STATUTE.

The prevailing statutes regulating the practice of pharmacy provide for the issuing of two grades of licenses, corresponding to pharmacist and assistant pharmacist.

The license issued to a pharmacist confers upon the licentiate the legal right to practice this profession in the broadest and fullest sense. He is thereby privileged to conduct a pharmacy, either as proprietor or as manager for another; to sell drugs, medicines or poisons, and compound and dispense the prescriptions of physicians.

The license issued to an assistant pharmacist confers only limited privileges. His position is simply that of an assistant, and, while acting in that capacity, he may manufacture, compound, sell, or dispense any drug, poison, medicine or chemical for medicinal use, or dispense or compound the prescriptions of medical practitioners, but he is not permitted to assume the management or take permanent charge of any store, office or any place where these things are done. The extreme limit allowed to him, in this respect, is that he may be left in charge of such a place during the temporary absence of the pharmacist.

As explained in another part of this work, the power to issue license under these statutes is lodged in a board or commission of pharmacy.

Into the hands of this board of pharmacy, holding office generally by gubernatorial appointment, is given large discretion in this matter of granting licenses. This discretion, however, is not to be exercised arbitrarily, but must be reasonable and legal. Their tests of the applicant's qualifications must be within the spirit of the statute, and must be uniform in all cases. If license be refused without just cause, mandamus will lie to compel a board to grant it.[1]

Special provision is made in these regulations for the recognition of the rights of all persons lawfully engaged in practice at the time that they take effect. Such persons are required, however, to present themselves for registration as pharmacists within a certain time; in default of which their legal standing is no better than that of him who has never been engaged in the practice or admitted to the profession. In fact, they must then make their application to the board of examiners and undergo the ordeal of the prescribed test, as required of all others who aspire to become pharmacists.

This time limit for registration under the statute was upheld in the State of New York, in a case under the statute of 1893. It seems that Chas. W. Ward possessed the legal qualifications of a pharmacist under the statute of 1884, but

[1] Harding v. People, 10 Colo. 387, 15 Pac. 727; Dental Exrs. v. People, 123 Ill. 227, 13 N. E. 201; State v. Fleischer, 41 Minn. 69, 42 N. W. 696.

failed to register within the ninety days required by that act. By way of relief to any persons having thus failed to register under the act of 1884, the statute of 1893 provided that such persons might, within ninety days after its passage, on eight days' notice to the Secretary of the Board, apply to the Supreme Court for an order directing the Board to issue to him a license. Ward failed also to make application within the ninety days provided for in the statute of 1893, and attempted to compel the State Board to license him, regardless of the limitations of time; but his motion to that end was denied.

Though the powers given to the boards of examiners under these statutes regulating the practice of pharmacy, medicine, etc., must not be exercised arbitrarily, yet they are broad and accompanied by a large discretion. They must be so directed as to carry out the real purpose of the law. For instance, a man may be refused a license to practice, although possessing the required educational qualifications, "if upon due notice and hearing he is fairly proved to be unworthy of public confidence."[1]

In the matter of revoking licenses already granted, it must appear, first, that good cause therefor exists.[2] Moreover, no such action must be taken against any person, without due notice

[1] Gage v. Censors, 63 N. H., 92-94.

[2] People v. McCoy, 125 Ill. 289, 17 N. E. 786.

being first given and a fair hearing accorded to him. His right to pursue his profession is to him a matter of property, and under the Constitution he cannot be deprived of his property without due process of law. If a man believes that he has been treated unjustly by the Board in a case of this kind, he can seek his remedy in the courts. In a western case, State v. Schultz, the certificate of the latter to practice medicine was revoked without notice to him of the proceedings. He continued to practice and appealed to the court from the decision of the Board. In the meantime, the Board had him arrested for practicing medicine without the license required by the statute. He was convicted and appealed from the judgment of conviction. The appellate court, in reversing the judgment of conviction, said: "No prosecution of this character can be maintained under the circumstances, and the appellant should have been allowed to prove that he had appealed from the decision of the board in revoking his certificate, and that the appeal was pending in the appropriate tribunal." Pursuing the subject further, the court said: "The decision of the board in this matter is not final, and upon an appeal the courts may declare null and void its proceedings."[1] In a Mississippi case, involving the disbarment of an attorney, without notice to him of the proceedings, the court said: "It is a cardinal principle in the administration

[1] State v. Schultz, 11 Mont. 429, 28 Pac. 643.

of justice that no man can be condemned or divested of his rights until he has had the opportunity of being heard."[1]

In the matter of practicing pharmacy without license, these statutes are prohibitory. Even a physician, though regularly licensed to practice medicine, is not permitted to conduct a drug store, or compound or dispense medicines to any person other than his own patient, without first procuring, in the usual way, a license to practice pharmacy.[2] Nor would a physician or any other person engaging in the practice of pharmacy, without being duly licensed therefor, be permitted to recover by process of law the value of his medicines or services.

This last rule is of general application to all persons who unlawfully engage in any business.[3] Nor will such persons, thus unlawfully pursuing a profession, be permitted in an action at law to recover judgment for damages on account of defamatory words directed against them in their professional capacity.[4]

[1] Ex parte Heyfron, 7 How. (Miss.) 127; People v. Turner, 1 Cal. 150, 52 Am. Dec. 295 and Note, 1 Cal. Note 13.

[2] Hewitt v. Charier, 16 Pick 353; State v. Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. C. 119; State v. Green, 112 Ind. 462, 14 N. E. 352; State v. Hathaway, 115 Mo. 36, 21 S. W. 1081; State v. Creditor, 44 Kan. 565, 21 Am. St. Rep. 306, 24 Pac. 346; Brown v. People, 11 Colo. 109, 17 Pac. 104.

[3] Ferdon v. Cunningham, 20 How., Pr. 154; Lanzer v. Unterberg, 9 Misc. 210, 29 N. Y. Supp. 683; Bloom v. Soberski, 8 Misc. 311, 28 N. Y. Supp. 731.

[4] Hargan v. Purdy, 93 Ky. 424, 14 Ky. Law Rep. 383, 20 S. W. 432; Skirving v. Ross, 31 Upper Can., 423; Collins v. Carnegie, I. A. & E. 695.

Where the statute provides that license may not be revoked for a cause punishable by law, until after conviction by a court of competent jurisdiction, and defendant pleads guilty in such court, then, though the court may neglect to make any further order in the case, yet the Board of Pharmacy may revoke the license. Its jurisdiction is independent.[1]

[1] Munkley v. Hoyt, 60 N. E. 413, 179 Mass. 108; Commonwealth v. Hoviour, 66 S. W. 323, Ky. Law Rep. 1724.

## CHAPTER VIII.

### EXPLANATORY OF CONTRACTS.

The plan of this work requires us to touch, though rather lightly, upon the vast domain of contract law, the principles of which enter in some form into almost every relation of life. The business man's daily work, from the simplest exchange of values to the most complicated commercial problem, is a sort of network woven of contracts of greater or less magnitude; from which it follows that their interpretation and construction forms a great part of the civil business of the courts.

A contract "is an agreement, upon sufficient consideration, to do or not to do a particular thing."[1] Mr. Story and Mr. Parsons define it as "a deliberate engagement between competent parties, upon a legal consideration, to do, or to abstain from doing, some act." "There must be a person able to contract; a person able to be contracted with; a thing to be contracted for; a sufficient consideration; words clearly expressing the agreement; and the assent of both parties to the same thing in the same sense."[2] "A contract is resolvable into proposal and acceptance, the proposal not to bind beyond a reasonable time, and, until accepted, may be conditional. The place

[1] Blackstone's Commentaries, Vol. 2, page 442.
[2] Justice v. Lang, 42 N. Y. 497, 1 Am. Rep. 576.

and time of acceptance are the place and time of the contract. The assent must be definite; non-refusal is not enough."[1] Mr. Justice Field says: "mutual assent to the terms is of the very essence."[2]

It will be sufficient, in this place, to consider contracts as divided into express contracts, contracts implied as of fact, contracts created by law, and quasi contracts. An express contract is one in which there is a formal agreement, stated either orally or in writing; and a contract implied as of fact is an express contract, the existence of which can not be proved by direct evidence, but must be inferred or presumed from existing conditions or circumstantial evidence. The sole difference between the two is in the form of proof.[3] A conveyance of land made to-day might be proven, in the near future, to have been based upon an express contract, while thirty years hence, with records destroyed and witnesses dead, it might be established only as a contract implied as of fact. From this it will be readily understood that, so far as concerns the real nature of the transaction and the principle involved, there is no difference between the express contract and the contract implied as of fact.

A contract created or implied by law is one in

[1] Wharton on Contracts, Chap. I.

[2] Louisiana v. Mayor of New Orleans, 109 U. S. 288, 3 Sup. Ct. Rep. 211, 27 L. Ed. 936, 10 U. S. Notes 628

[3] Bishop on Contracts, Sec. 257.

which the assent or agreement has not been expressed, but in which the law infers or presumes, from the existing obligation, that such assent or agreement was intended by the parties. If one orders goods from a merchant or procures services from a professional man or laborer, but says nothing of pay, the law will, ordinarily, imply or create a promise to pay for such goods or services, and thus in the interest of justice will complete a binding contract. For, in cases of this kind, "the law supplies that which, not being stated, must be presumed to have been the agreement intended."[1]

It may be stated as a principle that wherever "mutual assent to the terms" of the agreement exists, it is a legal contract, whether those terms are stated in words or merely implied by acts.

A quasi contract has been defined as "An unassented-to obligation in the nature of a contract." It is apparent from the definition that obligations of this class are not to be deemed true contracts, since they lack the essential quality of mutual assent to their terms. It can hardly be said that the law cures this defect by creating or implying a promise, since the very conditions of these obligations are generally repellent to the idea of assent by the party to be charged. What the law does in these cases is to settle the fact that an obligation exists, *nolens volens,* and the

[1] Story on Contracts, Vol. II; Leake on Contracts, Vol. II.

legal relations thus resulting are in the nature of a contract. If by accident one person comes into possession of money belonging to another, he is under an obligation to deliver the same to him to whom it rightfully belongs. The law does not create a promise, but it fixes an obligation, based upon the principle that one person is not to be unjustly enriched at the expense of another.

An express contract may be either oral or in writing. In the one case, the intention of the parties is made known by their spoken words, while in the other, it appears from their written statement. These, however, are but two different ways of expressing intention, giving rise, again, to a corresponding difference in the modes of proving the two different forms of contract.

The terms or covenants of an oral contract may be proved by evidence derived from oral testimony; but those of a written contract must be proved by the instrument itself, unless from the evidence it satisfactorily appears to the court that the writing cannot be found, or is in the possession of the opposite party, upon either of which conditions oral testimony may be introduced to prove its contents.

The several States of the Union have enacted statutes, based upon the English statute of frauds, providing that certain contracts shall be invalid unless some memorandum of their terms be in writing and subscribed by the party to be

charged, or by his agent. Of this class are, 1, "An agreement that by its terms is not to be performed within a year from the making thereof;" 2, "A special promise to answer for the debt, default or miscarriage of another;" 3, "An agreement made upon consideration of marriage, other than a mutual promise to marry;" 4, "Any special promise by an executor or administrator 'to answer damages out of his own estate'." 5, Any agreement for the sale of real property; 6, Any agreement for the sale of personal property, above a certain value, (which varies in different States), unless there be a delivery or a part payment.

These rules appear with some modifications in the statutes of the different States, respectively, and the reader is advised to consult those of the State in which he resides.

## CHAPTER IX.

### CONTRACTS OF DRUGGIST AND PHARMACIST.

It is not intended to deal here with the ordinary simple contracts into which the druggist as a business man may voluntarily enter. In regard to such agreements his obligations will, of course, be the same as those of other business men, and his responsibilities will be gauged by the general rules applicable to such relations. There are certain peculiar obligations, however, of the nature of implied contracts, that rest upon the modern druggist, in his twofold capacity of dealer in drugs and practitioner of pharmacy, and it is these which now claim our attention.

In a former chapter we have given a brief outline of the history and development of pharmacy. It is there shown that the modern drug business is, in a sense, an offshoot of the grocery business, and that as late as the seventeenth century, in England, these two now distinct branches of commerce were one, and carried on by the guild of grocers. These dealers in provisions were held to an implied warranty that all articles sold by them for domestic use were sound and wholesome, and the same rule is held to apply in

this age and in this country, at least to the extent of the purchase price of the goods.[1]

When, in the year 1615, Parliament passed the act by which the apothecaries or druggists were separated from the grocers and established as a distinct guild or corporation, the same legal status attended the apothecary as that which defined his operations as a grocer. He was bound by the same obligation of warranty as to the quality of the articles sold by him. Indeed, it may be said that the stringency of the rule in its application to cases has increased rather than diminished, with the advancement of the druggist's standing and opportunities in modern times. However, the force of this rule of law which lays upon the dealer in drugs this extraordinary responsibility as to the quality of the goods sold by him is not merely historical; for the fact is that the reason of the rule exists with greater significance in the case of the druggist than in the case of the grocer, from whom he may be said to have descended.

The rule of general application in the sale and purchase of goods is *"caveat emptor,"* which warns the purchaser of any specific article that he must see to it that the thing purchased by him

[1] Fleet v. Hollenkemp, 13 B. Mon. 219, 56 Am. Dec. 563; Van Bracklin v. Fonda, 12 Johns 468, 7 Am. Dec. 339, 3 Bla. Com. 165; Hyland v. Sherman, 2 E. D. Smith 234; Wright v. Hart, 18 Wend. 449; Burch v. Spencer, 15 Hun. 504; Miller v. Scherder, 2 N. Y. 267; Hoover v. Peters, 18 Mich. 51; Ely v. O'Leary, 2 E. D. Smith 261; McNaughten v. oy, 1 Weekly Notes Cas. 470.

is such as he wants. Under this rule, in the absence of fraud or misrepresentation on the part of the seller, if the buyer does not secure the quality or kind of goods that he intended to purchase, the law will not hold the seller liable.

The above rule applies where the sale is on inspection, and the knowledge possessed by the vendee is equal to that of the vendor.[1] It has even been held to apply in a case where goods had been ordered from the seller and the purchaser had not seen them until after delivery, on the theory that in such a case the vendee constitutes the vendor his agent to select the goods for him, and the former is bound only to the fair exercise of his judgment in making the selection.[2] Nor is the purchaser relieved from the force of this rule when buying goods that are packed; as paint sold in kegs[3], crockery in crates[4], flour in barrels[5], hemp in bales[6], tobacco in kegs[7], molasses in barrels[8]. The rule as applied to flour and molasses in these examples might seem to be opposed to the rule of guaranty which prevails in the case of provisions; but it must be remembered that the latter rule is applicable only to

1 Lord v. Grow, 39 Pa. St. 88, 80 Am. Dec. 504.
2 Dickson v. Jordan, 10 Ind. L. 166, 53 Am. Dec. 403.
3 Holden v. Dakin, 4 Johns 421.
4 Thompson v. Ashton, 14 Johns 316.
5 Hart v. Wright, 17 Wend. 267.
6 Salisbury v. Stainer, 19 Wend. 159, 32 Am. Dec. 437.
7 Hyatt v. Boyle, 5 Gill. and J. 110, 25 Am. Dec. 276.
8 Humphreys v. Comline, 8 Blackf. 516.

provisions sold "for domestic use" and cannot be invoked where such articles are bought in the way of merchandise to be sold again.[1]

Such is the common law doctrine of *"caveat emptor,"* and the above instances will serve to show some of the legal and reasonable limits of its applications. In the case of the druggist, however, the rule may be said to be reversed and the civil law doctrine of *"caveat venditor,"* which warns the seller instead of the purchaser to beware, is applied upon equally reasonable grounds. In rendering a decision in a leading American case, the Court said, "As applicable to the owners of drug stores, or persons engaged in vending dangerous medicines by retail, the legal maxim should be reversed. Instead of *"caveat emptor,"* it should be *"caveat venditor."* That is to say, let him be certain that he does not sell to a purchaser, or send to a patient, one drug for another, as arsenic for calomel, cantharides for, or mixed with, snakeroot and Peruvian bark, or even one innocent drug, calculated to produce a certain effect, in place of another sent for, and designed to produce a different effect."[2]

The druggist is held not only to the common law guaranty, applicable to grocers, that the article sold by him is wholesome, but he is also deemed to warrant that it is the identical substance asked for by the purchaser. The reason

[1] Emerson v. Brigham, 10 Mass. 197, 6 Am. Dec. 109.

[2] Fleet v. Hollenkemp, 56 Am. Dec. 563, 13 B. Mon. 229.

of this rule was clearly stated by the Court in a Texas case on appeal from the district court of Galveston County. In this case Judge Watts said, "It is claimed that in the sale of chattels, where the purchaser has an opportunity to examine before the purchase is made, that the common law rule of *'caveat emptor'* applies without exception. As a general rule the doctrine does apply in the purchase of chattels, when an opportunity for examination by the purchaser is shown. But when, from the nature of the article, or the peculiar character of the business in which the same is being sold, it is shown that an examination would not avail the purchaser anything, it might constitute an exception to the general rule, dependent upon the circumstances of each particular case. The appellee was engaged in the business of druggist, holding himself out to the public as one having the peculiar learning and skill necessary to a safe and proper conducting of the business. The general customer is not supposed to be skilled in the matter, and, as represented in this case, does not know one drug from another; but in the purchase of drugs, the customer must rely upon the druggist to furnish the article called for; and in this particular business, the customer who has not the experience and learning necessary to a proper vending of drugs would not be held to the rule that they must examine for themselves. It would be but

idle mockery for the customer to make the examination, when it would avail him nothing. On the contrary, the business is such that in the very nature of things the druggist must be held to warrant that he will deliver the drug called for and purchased by the customer."[1]

In brief, then, every druggist, simply as a dealer in drugs, is held to be bound by a contract of guaranty, to every purchaser unskilled in the nature of drugs, that the article sold by him is that which the purchaser has called for, and that the same is wholesome and of good quality. This rule, in itself, involves a grave responsibility, but the extraordinary liabilities of the pharmacist do not end with this. It is held, in a leading American case, that "It is his duty to know the properties of his drugs, and to be able to distinguish them from each other. It is his duty to so qualify himself, or to employ those that are so qualified, to attend to the business of compounding and vending medicines and drugs, as that one drug may not be sold for another; and so that when a prescription is presented to be made up, the proper medicines, and none other, be used in mixing and compounding it."[2]

In fact, the pharmacist guarantees, to every person for whom he prepares a prescription, that he possesses the requisite scientific knowledge and skill to enable him to correctly compound the

[1] Jones v. George, 56 Tex. 149, 42 Am. Rep. 689.

[2] Fleet v. Hollenkemp, 13 B. Mon. 229, 56 Am. Dec. 563.

same. He contracts, not only to use drugs that are of the right kind and wholesome, but also, in compounding such drugs, to use ordinary skill and knowledge combined with ordinary care. And it must be remembered that in thus dealing with dangerous drugs, "ordinary care" means a degree of care in proportion to the risk.

## CHAPTER X.

### Liability of Retail Druggist for Negligence.

The Kentucky case of Hollenkemp v. Fleet and Semple, known in the Kentucky Court of Appeals as Fleet v. Hollenkemp, is a leading case in the matter of the liability of retail druggists. The opinion of the Court was prepared by Justice Hise, and it is so direct and comprehensive in the treatment of the subject, that it is thought best to present the entire text of the opinion for the perusal of the student.

"John Hollenkemp sued William T. Fleet and Samuel P. Semple, partners in the business of vending drugs by retail, in an action upon the case, for having, through negligence, permitted a portion of the poisonous drug called 'cantharides' to be intermingled with some snakeroot and Peruvian bark which he had purchased at their drug store, and which he, being then indisposed, by the advice of his physician, had taken as medicine for his restoration, not knowing that the poison had been mixed with the bark and snakeroot, and that in consequence he had been very sick, endured great suffering, pain, and agony, and that his health had been thereby permanently injured. The defendant appeared, and pleaded not guilty. There was a trial, verdict, and judgment against the defendants for one thou-

sand one hundred and forty dollars and seventy-five cents damages, and costs of suit.

"The defendants moved the Court to set aside the verdict and judgment, and to grant them a new trial, upon various grounds, which may be all summed up and stated as follows:

"1. Because of the discovery of important evidence made during the progress of the trial, for the first time, and which they allege they had neither the opportunity nor power to procure and offer to the jury.

"2. Because the damages found by the jury were excessive, and unwarranted by the facts in the case and the proof in the cause.

"3. Because the court erred in giving the instructions asked for by the plaintiff's counsel, and in refusing those asked for by the counsel of the defendant.

"The court refused to grant a new trial, and the defendants' motion to that effect was overruled. The defendants filed their bills of exceptions to this and other decisions of the court given pending the trial.

"The evidence was reduced to writing and certified, and the defendants have appealed to this court.

"The evidence collectively presents, in substance, the following state of facts: The plaintiff having been sick for some time had improved and was convalescent. A tonic preparation was

recommended by the attending physician, who made out a written prescription for the plaintiff, as follows: That he should procure two ounces of snakeroot and two ounces of Peruvian bark, in the form of a powder, to be mixed and divided into four portions; to be made into a tea, by the application of three pints of water to each portion of snakeroot and bark; the patient to take half of a teacupful of the decoction twice each day. This prescription was sent by the plaintiff to the defendants' drug store to be filled. There the two ounces of snakeroot and two ounces of Peruvian bark were, by the clerk, in the presence of one of the defendants, put into a mill to be ground into a powder, and passed through the mill, and thus pulverized.

"It was then put up in separate papers, as directed by the prescription, and delivered to the plaintiff's messenger, who carried them to the plaintiff. A tea was made of one of the potions. The patient drank a half teacupful of the preparation, and shortly afterward the effect produced by the dose was so unexpected and extraordinary that the same physician was sent for who had drawn up the prescription, who, upon his arrival, found his patient laboring under all those violent symptoms which, according to all the evidence on the subject, are produced by cantharides when taken in sufficient quantity into the stomach. The physician, his suspicions

being aroused, procured and examined the three remaining potions of the medicine, as compounded at defendants' drug store, and easily detected the presence of Spanish flies in the mixture.

"They were taken to the drug store to inquire into the matter. The potions were recognized as having been compounded and put up in that store by the clerk, and the fact that some Spanish flies had been, in some way, mixed with the bark and snakeroot was detected and admitted.

"It is unnecessary to state in detail the symptoms and effects exhibited by the patient after taking one dose of the tea as directed; the proof is conclusive and satisfactory that they were most violent, dangerous, and excruciating, and precisely such as would be produced by a sufficient dose of cantharides. It is true that there was contrariety of opinion expressed by the physicians examined as to the durability and permanency of the injurious effects produced by the drug. The attending physician gave it as his opinion that the symptoms exhibited were produced by the cantharides, and that the plaintiff's health had been permanently injured by the dose which he had taken. Several other doctors examined gave it as their opinion that generally the effects of this drug, unless taken in sufficient quantity to produce death, would be only temporary and evanescent. That they had never known an instance where the health of a person

surviving the immediate effects produced by cantharides had been permanently injured; though they did not deny that such might be the consequence in some cases, where the peculiar condition of the patient's system was such as that the poisonous quality of the drug might be more pernicious and virulent in its effects, and that in special cases it might cause permanent ill health.

"There was evidence introduced by the defendants which was intended to screen and exempt them and their agent or clerk from the charge or imputation of having been guilty of inexcusable negligence in compounding and putting up the medicines, to wit, the snakeroot and Peruvian bark, as required by the prescription furnished by the plaintiff's medical adviser. The physicians examined as witnesses all concur in proving that the violent and injurious effects produced upon the plaintiff by the dose which had been taken by him could not have resulted if it had contained nothing but the snakeroot and Peruvian bark; that when taken in the quantities as administered to plaintiff they are harmless and innocent drugs, and the fact, as deduced from all the testimony in the case, is conclusively established that although the plaintiff sent them a prescription for snakeroot and Peruvian bark only, the defendants, being druggists, sent them in return, say by mistake, a compound made up of the drugs required, intermixed with a most

pernicious and deleterious poison, which in fact bears no kind of resemblance to the medicines named in the prescription, and the mingling of which with the innocent drugs sent for by the plaintiff was caused by improperly pulverizing the root and bark, by grinding them in the same mill in which Spanish flies had been previously ground.

"To sustain the ground taken for a new trial that new evidence had been discovered pending the trial, which circumstances rendered unavailable, the defendants rely upon the affidavits of Reubin Broaddus and T. N. Wise. Broaddus states in substance that he knew the plaintiff as far back as 1844, and that he then and frequently afterwards complained of weakness and feebleness, and that his health was so frail that sometimes he was not able to perform hard labor; that what he knew upon the subject was not discovered to the defendants until their attorney had commenced his argument to the jury.

"Assume these statements to be true, they do not sustain the motion for a new trial; because: First, if the testimony of Broaddus would have been important in aid of the defense, upon motion to the court, based upon the facts stated, the argument of the case would have been suspended, and Broaddus might have been sworn as a witness, and would have been allowed to give evidence to the jury before their retirement. But

although the witness was present, and defendants knew what he would prove before the case had been given to the jury, they did not offer to introduce him: Higden v. Higden, 2 A. K. Marsh. 42, 43. Second, because the defendants, from the facts in the record, are convicted of negligence in respect to their preparation of their defense. It appears that at the term preceding that during which the trial took place the cause had been fully investigated before a jury, and the evidence heard, but the jury failing to agree, there was a mistrial. The same evidence for the plaintiff was no doubt then given to the jury upon which he relied in the first trial; and the defendants had ample time, by reasonable inquiry, to have procured witnesses to establish the fact of the importance of which they could not have been ignorant, if it could have been done, to wit, that the ill health of the plaintiff had been of long standing and not of recent origin.

"As bearing upon the question of the amount of damages to be given by the jury, the plaintiff on the final trial, and, as is supposed, at the previous mistrial, introduced proof to the effect that his general health was good; the defendants could and should, therefore, by the exercise of due and proper diligence, have procured countervailing evidence, if the fact existed, to show that plaintiff's bad health had previously existed; and that it was not, therefore, caused by the drugs

prepared for him by them or their clerk. The present ill health of the plaintiff, and its true cause, was the main point of fact in issue and contested before the jury; and the defendants stated the case upon their preparation, as made, and cannot be indulged with a new trial because they may have ascertained during the trial that they could have strengthened their proof upon the issue in question, and especially when their witness was present before the argument to the jury was closed, and they might have had the benefit of his testimony upon application to the court: Chambers v. Chambers Adm'r, 2 A. K. Marsh. 349; Wells v. Phelps, 4 Bibb. 563.

"The affidavit of Dr. Wise does not give any material strength to the demand for a new trial. He merely states that he had visited the plaintiff professionally since he had taken the compound prepared for him at the drug store of the defendants, and that his opinion was that plaintiff's disease was an affection of the mucous membrane of the stomach and bowels, and not connected with the kidneys and bladder, or urinary organs. It is not perceived how Dr. Wise's statement could have produced a different verdict of the jury necessarily; for the disease attributed to the plaintiff by Dr. Wise may well have been produced by the cantharides taken by him. The proof in the cause of its effects, and generally of the symptoms and effects exhibited by the plain-

tiff, as consequent upon the dose administered to him, would make the conclusion reasonable that his disease as described by Dr. Wise, was thereby produced.

"The defendants have not shown that Dr. Wise's testimony, had it gone to the jury upon the trial, either could or ought to have induced the jury to have rendered a more favorable verdict for the defendants: Barrett v. Belshe, 4 Bibb., 349. So far, therefore, as the motion for a new trial was predicated upon the affidavits of Broaddus and Wise, and the accompanying affidavits of the defendants, it could not have been properly sustained.

"The next question presented is, that the Court should have sustained the motion for a new trial, because the damages are excessive.

"There is no fixed and certain criterion of damages for personal injuries, similar to those sustained by the plaintiff in this action. The question as to their amount is within the sound and reasonable discretion of the jury. The damages given may be more or less exemplary, or otherwise, as the circumstances of aggravation or extenuation characterizing each particular case may reasonably require.

"There is a class of personal injuries, such as slander, libel, malicious prosecution, and including injuries to a person's health, business, and property, caused by indirect means, unattended

with force, and for redress of which the remedy is by an action upon the case, and not by the action of trespass, for which a jury may give exemplary damages, as well where the action is in case as when it is in trespass; and whether exemplary damages should or should not be given does not depend upon the form of action so much as upon the nature and extent of the injury done, and the manner in which it was inflicted, whether by negligence, wantonness, or with or without malice: Merills v. Tariff Manufacturing Co., 10 Conn., 388 (27 Am. Dec. 682, and notes); Linsley v. Bushnell, 15 Conn. 235, 38 Am. Dec. 79; McLane v. Sharpe, 2 Harr. (Del.) 481.

"In the present case the damages given by the jury cannot be regarded as so excessive as to authorize this court to reverse the judgment on that ground. From evidence in the cause, the jury had the opportunity and the right to decide the question of fact as to the extent of the injury done to the plaintiff's health, and if the injury was considerable, protracted, or permanent, the amount of the damages found by them was, if even sufficient, not excessive, and the verdict and judgment ought not, on that ground, to be disturbed.

"But it is urged that the circuit judge improperly instructed the jury upon the law of the case. Upon motion of the attorney for the plaintiff, the court gave the following instruction:

No. 1. 'If the jury believe from the evidence that the defendants Fleet and Semple, were the proprietors of the drug store in the city of Covington at which the prescription, alluded to in the evidence, made for the plaintiff by Dr. Whitehouse, was compounded, and that said prescription, as put up at said drug store, contained Spanish flies, or cantharides, and that the plaintiff, in consequence of taking a part of it, was made sick or injured thereby, they ought to find for the plaintiff, even although they may believe that defendants were ignorant of the fact that said prescription did contain said ingredient.' Although the words of this instruction are injudiciously selected and arranged, yet, if its meaning is not misapprehended, it embraces in its terms a proposition of law pertinent to the case and applicable to the facts presented to the jury by the evidence. Of course the attorney who wrote the instruction, and the judge who gave it, in using the expression as to the 'prescription containing Spanish flies,' and as to the plaintiff's having taken a portion of the prescription, etc., have reference to the mixture compounded at the drug store, and not to the written prescription of the physician, intended as a direction to the druggists as to the drugs to be compounded.

"If the plaintiff sent a prescription to the defendants' drug store containing directions that snakeroot and Peruvian bark in certain quanti-

ties should be furnished, ground into powder, and mixed; then, if the defendants, or any employee of their drug store, in filling such prescription, whether ignorantly or by design, whether with or without the knowledge of the defendants, they, being proprietors, did intermix the poisonous drug cantharides, or Spanish flies, with the bark and snakeroot, and if, in taking this preparation or mixture as medicine, the plaintiff was injured, the defendants, being owners of the drug store, are legally responsible in damages to the plaintiff for the accident, if it was one, and for the outrage, if it was designed.

"It is a well established rule and principle of law, that the vender of provisions for domestic use is bound to know that they are sound and wholesome, at his peril: Van Bracklin v. Fonda, 12 Johns. 468 (7 Am. Dec. 339). It is a sound and elementary principle of law, that in contracts for the sale of provisions, the party by implication, who sells them undertakes that they are sound and wholesome: 3 Bla. Com. 165.

"In 3 Bla. Com., by Chitty, 91, it is laid down in general terms: 'Injuries affecting a man's health are where, by any unwholesome practices of another, a man sustains any apparent damage in his vigor or constitution, as by selling him bad provisions or wine, by the exercise of a noisome trade, or by the neglect or unskilful management of a physician, or apothecary—these are wrongs

or injuries unaccompanied by force for which there is a remedy in damages by a special action on the case.'

"Now, if a man who sells fruit, wines, and provisions is bound at his peril that what he sells for the consumption of others shall be good and wholesome, it may be asked emphatically, is there any sound reason why this conservative principle of the law should not apply with equal if not with greater force to vendors of drugs from a drug store, containing, as from usage may be presumed, a great variety of vegetable and mineral substances of poisonous properties, which if taken as medicine will destroy health and life, and the appearance and qualities of which are known to but few, except they be chemists, druggists, or physicians.

"The purchasers of wines and provisions, by sight, smell, and taste, may be able, without incurring any material injury, to detect their bad and unwholesome qualities; but many are wholly unable, by the taste or appearance of many drugs, to distinguish those which are poisonous from others which are innoxious, so close is their resemblance to each other; purchasers have, therefore, to trust the druggist. It is upon his skill and prudence they must rely. It is therefore incumbent upon him that he understands his business. It is his duty to know the properties of his drugs, and to be able to distinguish them

from each other. It is his duty so to qualify himself, or to employ those that are so qualified, to attend to the business of compounding and vending medicines and drugs, as that one drug may not be sold for another; and so that when a prescription is presented to be made up, the proper medicines, and none other, be used in mixing and compounding it. As applicable to the owners of drug stores, a person engaged in vending drugs and medicines by retail, the legal maxim should be reversed. Instead of *'caveat emptor,'* it should be *'caveat venditor.'* That is to say, let him be certain that he does not sell to a purchaser or send to a patient one drug for another, as arsenic for calomel, cantharides for or mixed with snakeroot or Peruvian bark, or even one innocent drug, calculated to produce a certain effect, in place of another sent for and designed to produce a different effect. If he does these things, he cannot escape civil responsibility, upon the alleged pretext that it was an accidental or an innocent mistake; that he had been very careful and particular, and had used extraordinary care and diligence in preparing or compounding the medicines as required, etc.; such excuses will not avail him, and he will be liable, at the suit of the party injured, for damages at the discretion of a jury.[1]

[1] Hanford v. Payne, 11 Bush. 380; Tessymond's Case, 1 Lewin's Crown Cases, page 169.

The defendants' attorney moved the court to instruct the jury as follows: 1. If from the evidence the jury believe that the defendants, in preparing the prescription, used due and reasonable skill, care, and diligence, they must find for defendants. 2. If from the evidence the jury believe that the defendants, in putting up the prescription, used extraordinary or unusual care, they must find for the defendants. These instructions were not given but properly refused by the court. The rule as to the degree of care and diligence necessary to be used in certain cases to exempt a party from liability, and as to the extent or degree of negligence necessary, to devolve civil responsibility upon the party guilty thereof, do not apply to the present and similar cases. It is absurd to speak of degrees of diligence and of negligence as excusing or not excusing, or as settling the question of liability or no liability, in a case where a vendor of drugs, being required to compound innocent medicines, runs them through a mill in which he knew a poisonous drug had shortly before been ground. If mistake or accident would excuse the sending of a medicine different from that applied for, which we do not admit and cannot readily conceive, there could have been neither mistake nor accident in this case, because the fact of the previous use of the mill was known to the vendors, and they are absolutely responsible for conse-

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quences which that knowledge enabled them and made it their duty to avoid. Even accidents or mistakes should not occur in a business of this nature, and they cannot ordinarily occur without there has been such a degree of culpable, if not wanton and criminal, carelessness and neglect as must devolve upon the party unavoidable and commensurate responsibility. We were asked by the attorneys in their argument, with some emphasis, if druggists are to be, in legal estimation, regarded as 'insurers.' The answer is that we see no good reason why a vendor of drugs should, in his business, be entitled to a relaxation of the rule which applies to vendors of provisions—which is that the vendor undertakes and insures that the article is wholesome. Sound public policy in relation to the preservation of the health and even of the lives of the people would seem to require that this rule should have a rigid and inflexible application to cases similar to the one under consideration.

"As the responsibility of the defendants in this case does not depend upon the degree of care or diligence or negligence used by them, but upon the naked fact that when requested to compound a medicine for plaintiff, to be composed alone of snakeroot and Peruvian bark, the preparation sent to the plaintiff contained also the poisonous drug cantharides, which had been recently ground in the same mill, the taking of which caused him

great pain, suffering, and sickness, if it has not permanently injured his health, the instructions asked by the defendants were properly refused.

"The instruction upon the subject of damages, given by the court in lieu of the one asked by plaintiff's attorney, though framed and expressed in language not so well chosen and adapted to present the proposition of law therein intended to be set forth as other language would have been, yet, as understood, the instruction is in substantial conformity to the views of this court as expressed in this opinion.

Wherefore the judgment of the Circuit Court is affirmed."

In the foregoing opinion, the court says it is absurd to speak of degrees of negligence in a case like the one under consideration. The failure to clean the mill in which the Spanish flies had been ground, though it was known that it might be needed at any moment to grind other drugs, was, manifestly, such gross negligence on the part of defendants, that it offers no room for the consideration of degrees.

The druggist or pharmacist is required to possess and use reasonable or ordinary knowledge, skill, and care in the practice of his profession. But it must be borne in mind that the term "ordinary," when used in this connection, may express the widest possible meaning, and that its force varies with the degree of risk involved.

In the compounding or handling of drugs that are dangerous to life or health, "ordinary" care means nothing less than the utmost care; and the omission to employ any necessary precautionary measure, such as that of cleaning a mill after grinding Spanish flies in it, amounts to gross negligence.

In this case the facts of negligence are so aggravated in their nature, that in applying the principles of law to the responsibility of the defendants, the court seems to have stated it a little too strong against the druggist in general. The rule that is here invoked as governing the liability of vendors of provisions, that is, that the vendor "undertakes and insures that the article is wholesome," is certainly of limited application in this age and country, except so far as pertains to the recovery of the purchase price of the article sold. Beyond this responsibility for the price of the goods, we believe that the liability of the vendor of provisions for selling an unwholesome article, as the law now stands, would involve in its determination the question of negligence as an important factor.

Certainly, the law does not make the druggist an insurer, and questions of knowledge, skill, and care are fundamental in determining his liability for mistakes. The following extract from an opinion submitted by Judge Cooley, in the Michigan case of Brown v. Marshall, 47 Mich.,

576, 41 Am. Rep. 728, 11 N. W. 392, we believe to be absolutely sound on this point: "The question is whether the delivery at a drug store of a deleterious drug to one who calls for one that is harmless, and a damage resulting therefrom, of themselves, give a right of action, even though there may have been no intentional wrong and the jury may believe there is no negligence. That such an error might occur without fault on the part of the druggist or his clerk, is readily supposable. He might have bought his drugs from a reputable dealer, in whose warehouse they have been tampered with for the purpose of mischief.

It is easy to suggest accidents after they come to his own possession, or wrongs by others, of which he would be ignorant and against which a high degree of care would not give perfect protection. But how misfortune occurs is unimportant if, under all circumstances, the fact of occurrence is attributable to him as a legal fault. The case is one in which a high degree of care may be required. * * * It is proper and reasonable that the care required shall be proportionate to the damages involved. But we do not find that the authorities have gone so far as to dispense with actual negligence as a necessary element in the liability when a mistake has occurred."

In the case of Thos. J. Norton, et al., v. Andrew B. Booth, 34 La. Ann. page 913, the plain-

tiff sues the defendant to recover the sum of ten thousand dollars as damages, for having caused the death of a person by his negligent error. The plaintiffs allege "that their daughter, Eleanor, was, in September, 1878, the minor wife of G. W. Norton, and then in a state of advanced pregnancy; that, owing to her condition, she needed and sent for a dose of epsom salts at defendant's store, where drugs and medicines are sold; that, through negligence, carelessness and want of skill, he sold and delivered, being paid therefor, instead of said salts, a dose of sulphate of zinc, a deadly poison; that this medicine was administered, and caused first, the death and bringing forth of the child their daughter was pregnant with, and, second, the death of the mother herself, after endurance of lasting, terrible and excruciating pains."

In the opinion rendered in this case, Chief Justice Bermudez says: "In the discharge of their functions, druggists and apothecaries, persons dealing in drugs and medicines, should be required not only to be skilful, but also exceedingly cautious and prudent, in view of the terrific consequences which may attend, as they have not infrequently in the past, the least inattention on their part. Cooley on Torts, pp. 75, 76, 648-9. All persons who deal with deadly poisons are held to a strict accountability for their use. The highest degree of care known among practi-

cal men must be used to prevent injury from the use of such poisons.[1] A druggist is undoubtedly held to a special degree of responsibility, for the erroneous use of poisons, corresponding with his superior knowledge of the business. Thomas v. Winchester, 6 N. Y., 397, 57 Am. Dec. 455 and notes; Fleet v. Hollenkemp, 13 B. Mon. 219, 56 Am. Dec. 563; Sherman and Redfield on Negligence, 592."

1 Peters v. Johnson, 41 S. E. 190, 50 W. Va. 644, 57 L. R. A. 428, 88 Am. St. Rep. 909 and notes; McVeigh v. Gentry, 76 N. Y. Supp. 535, 72 App. Div. 598.

## CHAPTER XI.

### Liability for Error in Preparing Prescriptions.

We are now to consider the work of the druggist in his more scientific character. In other words, it is the pharmacist or skilled man of science whose legal responsibilities claim our attention.

In the chapter of this book that treats of the application of the principles of contracts, it is explained that the pharmacist is, in the eye of the law, under an implied contract with every person with whom he deals professionally, that, in rendering to him his professional services, he will use ordinary knowledge, skill, and care. In the last chapter we called attention to the fact that the meaning of the word "ordinary" here, as applied to care, varies with the degree of risk involved, and that it may mean the highest possible degree of care. It must be remembered, also, that the same word, in its application here to knowledge and skill, is to be understood in the light of science and progress. It is the "ordinary" knowledge and skill of the educated and trained pharmacist that is here required by law, and in every issue involving questions as to the exercise of the required degree of knowledge or skill, it is necessary for the court to consider the degree of advancement to which the science of

pharmacy has attained, at the time that the cause of action arises.

The legal history of the practice of pharmacy discloses the fact, that many serious injuries, and occasional deaths, have occurred through errors in compounding the prescriptions of physicians.

In a Louisiana case, entitled William McCubbin, Tutor, v. Samuel Hastings, reported in 27 La. Ann. page 715, are found the gruesome records of one of these mistakes. We here present the facts of the case as reviewed in the opinion of the court.

"On Monday, the twenty-sixth of August, 1867, the wife of William McCubbin was attacked with yellow fever. A physician was immediately called in, and the patient was placed under the charge of a nurse.

"On the Wednesday following she was quiet. About one o'clock of that day the physician ordered her an enema. We are satisfied from the evidence that the enema as ordered was to have been composed as follows: Sulphate of quinine thirty grains, mucilage of gum Arabic four ounces, camphor water four ounces, Batley's sedative solution, thirty or sixty drops, to be administered one half as soon as received, the other in an hour after. We ascertain the component parts of the prescription from the testimony of the physician, as the prescription itself could not be found in the defendant's shop where

it should have been kept. The prescription was ordered by the physician to be compounded at the defendant's shop. The husband of the deceased took it there. He handed it to an employee. After it was compounded he purchased an injection pipe, paid for both, and left. He gave them to the nurse. She administered a portion of it. The effect seems to have been instantaneous. It threw the unfortunate woman into spasms, and convulsions, causing her to purge and vomit at the same time. The attending physician was immediately sent for. He could not be found, and reached his patient late at night. He did all that his science allowed him to do for her relief. He called in another physician. Their efforts were fruitless. Two days after the patient died.

"This suit is instituted by the husband of the deceased and the father of her child, a minor, against the defendant to make him responsible in damages for the death of this woman, the allegation being that the prescription was improperly compounded.

"The evidence leaves no doubt on our mind that spirits of camphor was substituted for camphor water; that the sufferings of the woman, which are shown to have been intense, were caused by this mistake, camphor water being a very innocent preparation; spirits of camphor being a decoction of camphor and alcohol; and that it

contributed to a large extent, if it did not absolutely cause the death of the patient.

"The prescription was not compounded by the defendant. At the time it was put up he was not in the city. The clerk had not been employed by him. His services had been engaged by his brother. The defendant is none the less responsible for his acts. The employment was authorized, and his responsibility for the acts of his employees cannot be disputed.

"The case was twice tried before a jury in the Fifth District Court. It was then, by consent, remanded to the Fourth District Court, and submitted to the judge alone. He decided in favor of the defendant, and the plaintiff has appealed."

In speaking of the damages claimed on behalf of the plaintiff and the minor child, the court says: "His damages, if he is entitled to any, is the amount expended by him for medical and other services subsequent to the giving of the enema, and for the funeral expenses.

"The right to damages on the part of the child is that which he inherits from his mother.

"The defendant filed a peremptory exception to plaintiff's demand on the ground that the petition disclosed no cause of action. This exception was filed after the jury had been empaneled. The grounds upon which it rests are, first, 'because it is not alleged that the damage complained of was suffered through the fault of the

defendant, and it is necessary it should be alleged to be the defendant's fault before that fact could be proved,' and second, 'because it (the petition) does not state that the defendant, as employer, might have prevented the act which caused the damage, and did not do it.' The exception was sustained, but the plaintiff was allowed to amend. Plaintiff excepted to the ruling of the court, which maintained the exception. Defendant excepted to the order allowing plaintiff to amend. Both rulings were correct. The exception was a peremptory one and could be pleaded at any time during the progress of the trial. Amendments are always allowed in the discretion of the court.

"After the amendment was made, defendant then pleaded the prescription of one year. The plea was properly overruled. The demand was made within the year of the alleged tort. The demand is the test, and not the sufficiency of the allegations which support it.

"But the defendant still contends that the amended petition is defective, because it does not allege that he was in fault. The allegations are, that the death of the deceased was caused by the negligence of the defendant's clerk, and that he, the defendant, might have prevented the act complained of, but did not do so. If the act which caused the damage was done by the defendant's clerk, and the defendant be responsible

therefor, and the defendant could have prevented it, but did not, then clearly it was by the fault of the defendant that the damage occurred, and the use of the word fault was not a necessary allegation to fix the responsibility upon him. If he could have prevented the act, and did not, he was necessarily in fault.

"On the trial the defendant moved to strike out the second and third causes of action as stated in the petition, which are: Second, 'Also as tutor of his minor, for ten thousand dollars damages, suffered by the minor, personally, in the loss and deprivation of the care, education, assistance and love of his mother.'

"Third, 'In his individual capacity, and in his own behalf for five thousand dollars damages, for actual expenses, loss of the assistance and services of his wife in business, and for personal sufferings in mind for the loss of his wife, all caused by said criminal mistake.'

"The judge ordered them stricken out. As regards the second, his ruling was correct. The action, in so far as the minor is concerned, is the right of action which his mother had against the defendant for the suffering which was caused her by the defendant's employee, and which he inherited. He has no claim against him for the loss which he suffered through his mother's death. With regard to the third objection, the court erred. Defendant is responsible to the plaintiff

for all the expense and damage which he suffered subsequent to the giving of the enema." Pursuing the question of defendant's liability, the court says:

"The first objection which the defendant raises to the plaintiff's demand on the merits is, that the certificate of death, given by the physician, states that she died of yellow fever, and that the plaintiff caused it to be published in the newspapers that she died of yellow fever.

"In so far as the certificate was concerned that was no act of the plaintiff's. As regards the notice, she might have died of yellow fever and still her death from that disease might have been caused by the enema. If a pistol had been fired into some fleshy part of her body while she was laboring under an attack of fever, the ball itself might not have produced death, but the shock by aggravating the fever probably would. Under these circumstances she probably would have died of yellow fever, but her death would have been superinduced by the shot. So in this case.

"The deceased was suffering under an attack of yellow fever. It was a violent attack. Quiet and repose were of all things most necessary to her safety. She was dangerously ill, it is true. But she had at least one chance for her life, and the injecting of the violent and exciting substance (into a particularly sensitive portion of the body) took, in our opinion, from the unfor-

tunate woman the one chance that was left to her. She died, it is true, from yellow fever, but it was the enema which made the fever result fatally.

"The next ground of defense is, that defendant cannot be condemned, unless the plaintiff proves that he was some way in fault, and that he really might have prevented the act which caused the damage. In one sense it was impossible for him to have prevented the calamity, because he was not in the city. But, if a master is only to be held responsible for the act of his servant when he might have prevented the act and did not, there would be no responsibility in the principal, except for such acts as were done in his presence. If this were the law, if the driver of a carriage owned by the keeper of a public stable, wantonly ran into and destroyed the carriage of another, the owner of the public carriage would not be held responsible for the damage caused by his servant, because it was no fault of his that the other carriage was run into.

"If a man is run over by a careless car driver, the company in whose employ the driver is, cannot be held responsible, because it was not the company's fault. But we know that this has never been considered law, and that where injuries have occurred as the result of carelessness on the part of employees of such parties, the principals have been made to refund in damages.

He further attempts to exculpate himself, from the fact that the clerk who compounded the prescription was reputed to be a competent druggist. To a certain extent he has established this: that is to say, he has produced a number of witnesses who testify in that direction. But there is one recommendation which he did not have, and that was a diploma. It is not pretended that he was a graduate in pharmacy from any medical institute.

"It may, however, be assumed that he was competent. The defendant's liability would be none the less certain. The defendant is himself represented as being a most competent druggist. If he had made the mistake, would his proficiency in his calling shield him? Incompetency and carelessness—and such mistakes arise from one or the other of these causes—result in the same way. Either or both produce suffering and sometimes death. And can it be that if a physician should prescribe for his slightly ailing patient a small quantity of calomel and soda, and the druggist were to substitute arsenic for soda, that he could shield himself from the consequences which might result, by saying, if the prescription was compounded by himself, that it was a mistake, and if the act of his servant, that he could not have prevented it? The law does not place a community in the position of being poisoned by mistakes, with no one to be held responsible

therefor. If it was the master who did the wrong, the master is responsible. If it was his servant who did it, he is still responsible, for the master is responsible for the acts of his servant when done in the course of his usual employment.

"The least serious defense set up is, that the enema did the patient no harm. Many physicians were examined upon this point, and counsel for the defendant, in the very able brief which he furnished us, says: 'With surprising unanimity, these physicians, every one of whom have had large experience in the treatment of yellow fever, declared the effect would have been beneficial rather than injurious.'

"As we have said before, Mrs. McCubbin was taken ill on Monday, the twenty-sixth of August. On the Wednesday following the enema was administered. Up to this time the patient had been quiet. The nurse says that, turning into the third day, the fever began to abate and the physician said he found her much better; that he was going to order a mixture that would act like a charm, as she was not sweating freely enough. The enema came and this is how the nurse, who administered it, described the effects: 'As soon as I gave it to her she commenced to complain; she said, 'Oh, nurse, don't give me any more, for God's sake! It will kill me.' I set the cup down on the bed and called McCubbin (who had left the room at his wife's request when the nurse was

about to administer the enema) and told him the injection made her very ill. It made her that ill it threw her into spasms. She commenced throwing up and purging down, and was in great agony, but got easier afterwards.'

"McCubbin swears that, when he got upstairs, his wife was straightened out and almost black in the face, and apparently in spasms or a fit. He says: 'I put my hands underneath her to raise her from the bed; she worked in the spasms about three minutes, and in her spasms both purged and vomited at the same moment, which seemed to give her some ease. 'Oh, my God, Will,' she said, 'what have you given me? I am all on fire! I am burning!' and so she kept on. You could hear her until ten o'clock at night a block off, and she had never made a moan before."

"The attending physician was sent for immediately. It was a season of calamity. The physician was in full practice, and, hurrying as he was, from patient to patient, could not be found. Late in the night he came of his own accord. Discovering her condition, he immediately denounced the mistake which had been made; said to several who were present, and at various times, that the injection had injured her; took the bottle himself to the druggist to see whether, perchance, he had made the mistake in writing out the formula, and is shown to have said that, but for the injection, his patient would have done well. He

did all in his power to remedy the evil which had been done. Nothing that was tried for her relief succeeded. She sank gradually from the time the enema was administered until three days afterward, when she died.

"When scientific gentlemen undertake to tell us, under such a state of facts, that the enema, as administered, was a benefit to the patient instead of an injury; that a substance as powerful as alcohol, in which camphor, a violent stimulant, has been dissolved, can be injected into one of the tenderest parts of the human frame, when the patient is suffering from a severe attack of such a disease as the yellow fever is, without doing any harm, but, on the contrary, doing good, we see in our mind's eye the unfortunate victim upon whom the experiment has been tried, as she is described by the witnesses, writhing in agony, dying, dead, and we say that that dreadful fact alone destroys all their theories; and we think that he who, by himself or those for whose acts he is responsible, caused this agony, not to say death, should be made to answer for the suffering which he caused.

"As regards the damages, the plaintiff has not shown what he expended, and therefore we can give him no judgment. As to the minor child, we think he should receive twenty-five hundred dollars.

"It is therefore ordered, adjudged and decreed that the judgment of the district court be voided, annulled and reversed, and it is now ordered, adjudged and decreed that there be judgment in favor of the plaintiff, William McCubbin, in his capacity as tutor to his minor child, William James McCubbin, and against the defendant, in the sum of twenty-five hundred dollars, with legal interest from judicial demand, and costs of suit in both courts."

"Wyly, J., dissenting. The physicians who testified in this case all agreed that if the mistake had occurred in filling the prescription, and spirits of camphor instead of camphor water had been used, it would have improved the prescription and the result would have been beneficial instead of injurious to the patient. The opinion of experts is evidence. And according to the evidence, no injury resulted from the alleged mistake of defendant's clerk. The case should be decided according to the evidence in the record, and from it, it appears no damage was done. Besides, the proof fails to establish with legal certainty the fact that a mistake occurred. Both a mistake and an injury must be shown in order to recover. I dissent in this case.

"Rehearing refused."

## CHAPTER XII.

### LIABILITY OF MANUFACTURING PHARMACISTS.

In dealing with this subject the same method will be pursued as that employed in the last chapter. The law herein has been exhaustively presented and ably discussed in the leading case, Thomas v. Winchester, 6 N. Y. 397; also reported in Vol. 57 of Am. Dec., 455, and monographic note.

This was an action in the supreme court of the State of New York, commenced in August, 1849, against Winchester and Gilbert to recover damages on account of injuries, alleged to have been sustained by Mrs. Thomas, from the effects of a quantity of extract of belladonna, administered to her by mistake as extract of dandelion.

In the Court of Appeals, Ruggles, Chief Justice, delivered the following opinion, in which the facts of the case are set out with sufficient fullness to form a basis for the legal reasoning of the distinguished jurist.

By the Court, Ruggles, C. J. "This is an action brought to recover damages from the defendant for negligently putting up, labeling, and selling as and for the extract of dandelion, which is a simple and harmless medicine, a jar of the extract of belladonna, which is a deadly poison; by means of which the plaintiff, Mary Ann Thomas, to whom, being sick, a dose of dandelion was

prescribed by a physician, and a portion of the contents of the jar was administered as and for the extract of dandelion, was greatly injured, etc.

The facts proved were briefly these: Mrs. Thomas being in ill health, her physician prescribed for her a dose of dandelion. Her husband purchased what was believed to be the medicine prescribed, at the store of Dr. Foord, a physician and druggist in Cazenovia, Madison County, where the plaintiffs reside.

A small quantity of the medicine thus purchased was administered to Mrs. Thomas, on whom it produced very alarming effects, such as coldness of the surface and extremities, feebleness of circulation, spasms of the muscles, giddiness of the head, dilation of the pupils of the eyes, and derangement of the mind. She recovered, however, after some time, from the effects, although for a short time her life was thought to be in great danger. The medicine administered was belladonna, and not dandelion.

The jar from which it was taken was labeled '1-2 lb. dandelion, prepared by A. Gilbert, No. 108 John Street, N. Y. jar 8 oz.'

It was sold for and believed by Dr. Foord to be the extract of dandelion, as labeled. Dr. Foord purchased the article as the extract of dandelion from James S. Aspinwall, a druggist at New York. Aspinwall bought it of the defendant as extract of dandelion, believing it to be

such. The defendant was engaged at 108 John Street, New York, in the manufacture and sale of certain vegetable extracts for medicinal purposes, and in the purchase and sale of others. The extracts manufactured by him were put up in jars for sale, and those which he purchased were put up by him in like manner.

The jars containing extracts manufactured by himself and those containing extracts purchased by him from others were labeled alike. Both were labeled like the jar in question, as 'prepared by A. Gilbert.' Gilbert was a person employed by the defendant at a salary as an assistant in his business. The jars were labeled in Gilbert's name because he had been previously engaged in the same business on his own account at No. 108 John Street, and probably because Gilbert's labels rendered the articles more salable. The extract contained in the jar sold to Aspinwall, and by him to Foord, was not manufactured by the defendant, but was purchased by him from another manufacturer or dealer. The extract of dandelion and the extract of belladonna resemble each other in color, consistence, smell and taste; but may on careful examination, be distinguished the one from the other by those who are well acquainted with these articles.

Gilbert's labels were paid for by Winchester and used in his business with his knowledge and assent.

The defendant's counsel moved for a nonsuit on the following grounds: 1. That the action could not be sustained, as the defendant was the remote vendor of the article in question; and there was no connecting transaction or privity between him and the plaintiffs, or either of them. 2. That the action sought to charge the defendant with the consequences of the negligence of Aspinwall and Foord. 3. That the plaintiffs were liable to and chargeable with the negligence of Aspinwall and Foord, and therefore could not maintain this action. 4. That according to the testimony Foord was chargeable with negligence, and the plaintiffs therefore could not sustain this suit against the defendant; if they could sustain a suit at all, it would be against Foord only. 5. That this suit being brought for the benefit of the wife, and alleging her as the meritorious cause of action, cannot be sustained. 6. That there was not sufficient evidence of negligence in the defendant to go to the jury.

The judge overruled the motion for a nonsuit, and the defendant's counsel excepted.

The judge among other things, charged the jury, that if they should find from the evidence that either Aspinwall or Foord was guilty of negligence in vending as and for dandelion the extract taken by Mrs. Thomas, or that the plaintiff, Thomas, or those who administered it to Mrs. Thomas, were chargeable with negligence in

administering it, the plaintiffs were not entitled to recover; but if they were free from negligence, and if the defendant, Winchester, was guilty of negligence in putting up and vending the extracts in question, the plaintiffs were entitled to recover, provided the extract administered to Mrs. Thomas was the same which was put up by the defendant and sold by him to Aspinwall, and by Aspinwall to Foord. That if they should find the defendant liable, the plaintiffs in this action were entitled to recover damages only for the personal injury and suffering of the wife, and not for loss of service, medical treatment, or expense to the husband, and the recovery should be confined to the actual damages suffered by the wife.

The case was properly brought in the name of the husband and wife for the personal injury and suffering of the wife; and the case was left to the jury with the proper instructions on that point: 1 Ch. Pl. 62, ed. of 1828.

The case depends on the first point taken by the defendant on his motion for a nonsuit; and the question is, whether, the defendant being a remote vendor of the medicine, and there being no privity or connection between him and the plaintiffs, the action can be maintained.

If in labeling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant excepting

that which he owed to Aspinwall, his immediate vendee, in virtue of his contract of sale, this action cannot be maintained. If A. build a wagon and sell it to B., who sells it to C., and C. hires it to D., who, in consequence of the gross negligence of A. in building the wagon, is overturned and injured, D. cannot recover damages against A., the builder. A's obligation to build the wagon faithfully arises solely out of his contract with B.; the public have nothing to do with it. Misfortunes to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act imminently dangerous to human life.

So, for the same reason, if a horse be defectively shod by a smith, and a person hiring the horse from the owner is thrown out and injured in consequence of the smith's negligence in shoeing, the smith is not liable for the injury. The smith's duty in such case grows exclusively out of his contract with the owner of the horse; it was a duty which the smith owed to him alone, and to no one else.

And although the injury to the rider may have happened in consequence of the negligence of the smith, the latter was not bound, either by his contract or by any consideration of public policy or safety, to respond for his breach of duty to any one except the person he contracted with.

This was the ground on which the case of Winterbottom v. Wright, 10 Mee. & W. 109, 11 L. J. Exch. 415 was decided. A. contracted with the postmaster-general to provide a coach to convey the mail-bags along a certain line of road, and B. and others also contracted to horse the coach along the same line. B. and his co-contractors hired C., who was the plaintiff, to drive the coach. The coach, in consequence of some latent defect, broke down; the plaintiff was thrown from his seat and lamed. It was held that C. could not maintain an action against A. for the injury that he sustained.

The reason of the decision is best stated by Barron Rolfe: A's duty to keep the coach in good condition was a duty to the postmaster-general, with whom he made his contract, and not a duty to the driver employed by the owners of the horses.

But the case in hand stands on a different ground. The defendant was a dealer in poisonous drugs. Gilbert was his agent in preparing them for market. The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of the belladonna by means of the false label. Gilbert, the defendant's agent, would have been punishable for manslaughter if Mrs. Thomas had died in consequence of taking the falsely labeled medicine. Every man who by his culpable negligence causes

the death of another, although without intent to kill, is guilty of manslaughter: 2 R. S. 662, sec. 19. A chemist who negligently sells laudanum in a vial labeled as paregoric, and thereby causes the death of a person to whom it is administered, is guilty of manslaughter: Tessymond's case, 1 Lew. C. C. 169. So highly does the law value human life, that it admits of no justification wherever life has been lost, and the carelessness or negligence of one person has contributed to the death of another: Regina v. Swindall, 2 Car. & Kir. 232, 233, 2 Cox, C. C. 141; and this rule applies not only where the death of one is occasioned by the negligent act of another, but where it is caused by the negligent omission of a duty of that other: Regina v. Haines, 2 Car. & K. 368-371.

Although the defendant Winchester may not be answerable criminally for the negligence of his agent, there can be no doubt of his liability in civil action, in which the act of the agent is to be regarded as the act of the principal.

In respect to the wrongful and criminal character of the negligence complained of, this case differs widely from those put by defendant's counsel. No such imminent danger existed in those cases.

In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury therefore was not

likely to fall on him, or on his vendee, who was also a dealer; but much more likely to be visited on a remote purchaser, as actually happened.

The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution? or that the exercise of that caution was a duty only to his immediate vendee, whose life was not endangered? The defendant's duty arose out of the nature of his business and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labeled into the market; and the defendant is justly responsible for the probable consequences of the act.

The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison, mislabeled, into the hands of Aspinwall as an article of merchandise to be sold and afterwards used as the extract of dandelion, by some person then unknown.

The owner of a horse and cart who leaves them unattended, in the street, is liable for any damage which may result from his negligence: Lynch v. Nurdin, 1 Ad. & El., N. S., 29, 4 P. & D. 672, 1 B. 29, 10 L. J. B. 73, 5 Jur. 797; Illidge v. Goodwin, 5 Car. & P. 190.

The owner of a loaded gun who puts it into the hands of a child, by whose indiscretion it is discharged, is liable for the damage occasioned by the discharge; Dixon v. Bell, 5 Maul. & Sel. 198, 1 Stark. 287, 17 R. R. 308.

The defendant's contract of sale to Aspinwall does not excuse the wrong done to the plaintiff. It was a part of the means by which the wrong was effected. The plaintiff's injury and their remedy would have stood on the same principle if the defendant had given the belladonna to Dr. Foord without price, or if he had put it in his shop without his knowledge, under circumstances which would probably have led to its sale on the faith of the label. Peters v. Johnson, 41 S. E. 190, 50 W. Va. 644, 57 L. R. A. 428, 88 Am. St. Rep. 909 and notes; McVeigh v. Gentry, 76 N. Y. Supp. 535, 72 App. Div. 598. ,

In Longmeed v. Holliday, 6 Eng. Law & Eq. 562, the distinction is recognized between an act of negligence imminently dangerous to the lives of others and one that is not so. In the former case, the party guilty of the negligence is liable to the party injured, whether there be a contract between them or not; in the latter, the negligent party is liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract.

The defendant, on the trial, insisted that Aspinwall and Foord were guilty of negligence in

selling the article in question for what it was represented to be in the label, and that the suit, if it could be sustained at all, should have been brought against Foord. The judge charged the jury that if they, or either of them, were guilty of negligence in selling the belladonna for dandelion, the verdict must be for the defendant; and left the question of their negligence to the jury, who found on that point for the plaintiff.

If the case really depended on the point thus raised, the question was properly left to the jury. But I think it did not. The defendant by affixing the label to the jar, represented its contents to be dandelion; and to have been "prepared" by his agent, Gilbert. The word "prepared" on the label must be understood to mean that the article was manufactured by him, or that it had passed through some process under his hands, which would give him personal knowledge of its true name and quality. Whether Foord was justified in selling the article upon the faith of the defendant's label would have been an open question in an action by the plaintiffs against him, and I wish to be understood as giving no opinion on that point. But it seems to me to be clear that the defendant cannot, in this case, set up as a defense that Foord sold the contents of the jar as and for what the defendant represented it to be. The label conveyed the idea distinctly to Foord that the contents of the jar was the extract of

dandelion; and that the defendant knew it to be such.

So far as the defendant is concerned, Foord was under no obligation to test the truth of the representation. The charge of the judge in submitting to the jury the question in relation to the negligence of Foord and Aspinwall cannot be complained of by the defendant.

Gardiner, J., concurred in confirming the judgment, on the ground that selling the belladonna without a label indicating that it was a poison was declared a misdemeanor by statute: 2 R. S. 694, sec. 23; but expressed no opinion upon the question whether, independent of the statute, the defendant would have been liable to these plaintiffs.

Gridley, J., was not present when the cause was decided. All the other members of the court concurred in the opinion delivered by Chief Justice Ruggles.

Judgment affirmed.

We find that in the foregoing case the principles governing agency are a significant feature. These principles apply in the case of a druggist or pharmacist and his clerk. The clerk is the agent of his employer, and while acting within the scope of his authority his acts will bind his employer. The employer is liable, civilly, for all damages resulting from the negligence or mis-

takes of his clerk, while the clerk, himself, is liable both civilly and criminally.[1]

1 Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298; McCubbin v. Hastings, 27 La. Ann. 715; Burgess v. Sims Drug Co., 114 Iowa 275, 89 Am. St. Rep. 359, 86 N. W. 307, 54 L. R. A. 364, Martin v. Temperley, 42 B. 298, 3 G. & D. 497, 12 L. J. 2 B. 129; 7 Jur. 150.

## CHAPTER XIII.

### CONTRIBUTORY NEGLIGENCE.

"Contributory negligence" has been defined as "The absence of reasonable care and caution in a given case, on the part of a complainant."[1] In another instance the court defined it as being "Any want of ordinary care, even in a slight degree, which directly contributes to the injury."[2] Again, it has been said judicially that "If the complainant's fault, whether of omission or commission, has been the proximate cause of his injury, he is without remedy against one also in the wrong."[3]

When it appears from the evidence in a case that the plaintiff, himself, is the only one chargeable with negligence, then, though the defendant's act may have been the immediate cause of the damage, of course there can be no recovery against the plaintiff. It is in those cases where the defendant, also, has been negligent, that the question arises as to whether the damage was caused solely by the negligence of the defendant, or, whether the plaintiff so far contributed to the injurious result, that but for his negligent act or

[1] Washington Etc. R. R. Co. v. Gladmon, 15 Wall. 401, 21 L. Ed. 114, 7 U. S. Notes 909.

[2] Neanow v. Uttech, 46 Wis. 590, 1 N. W. 221.

[3] Little v. Hackett, 116 U. S. 371, 6 Sup. Ct. Rep. 391, 29 L. Ed. 652, 11 U. S. Notes 36.

omission it could not have occurred. If the evidence shows the former case to be true, the plaintiff may recover, but if the latter case be proven he can recover nothing.[1]

In some of the States, the burden of proving contributory negligence on the part of the plaintiff rests wholly upon the defendant, and he must establish this defense by a preponderance of evidence.[2] In others, it is held that the plaintiff must not only show that the defendant was negligent, but must also prove that he, himself, "was in the exercise of due care with respect to the occurrence from which the injury arose."[3]

It may easily occur in the experience of the pharmacist that, while chargeable with a mistake himself, he may be saved from a judgment for damages by proving contributory negligence on the part of the one complaining of injury. A typical example of contributory negligence arising in connection with the practice of pharmacy is found in the case Gwynn v. Duffield, 61 Iowa, 64, 47 Am. Rep. 802, 15 N. W. 594. We will submit the facts of the case with the reasoning of the court thereon, for the careful consideration of

[1] Railroad Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506, 9 U. S. Notes 279.

[2] MacDougall v. Central R. R. Co., 63 Cal. 431, 4 Cal. Notes 99; Hocum v. Weitherick, 22 Minn. 152; Mallory v. Griffey, 85 Pa. St. 275.

[3] Fox v. Glastenbury, 29 Conn. 204; Chicago Etc. R. R. Co. v. Freeman, 6 Ill. App. 608; Hinckley v. Cape Cod R. R. Co., 120 Mass. 257; Ronker v. St. John, 21 Ohio Cir. Ct. Rep. 39.

the reader. The report of the case represents that "The defendants are apothecaries engaged in business as apothecaries. The plaintiff brings this action to recover of them $5000.00, as damages alleged to have been sustained by reason of their negligence as apothecaries. They pleaded a general denial. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendants appeal."

The following opinion in this case was rendered by Adams, Judge: "The injury was caused by reason of the plaintiff's taking an overdose of belladonna. He went into the defendants' drug store and helped himself to what he supposed was a dose of the extract of dandelion; unfortunately the jar from which he helped himself contained belladonna, and what he took was an overdose of that drug. He avers that the defendants sold him the dose in question for the extract of dandelion, and also that he took it under their direction, and under their representation that it was the extract of dandelion.

He introduced very little evidence, if any, tending to show that the defendants sold him the dose. But he showed circumstances from which the jury was justified, if they believed the evidence, in finding that the defendants consented to his having the dose as a gift. In addition to this he showed beyond controversy that the defendants were guilty of negligence. He showed also, that

belladonna is a poison, and that injury resulted to him from taking it.

Now the law is clear that where a person, whether an apothecary or not, negligently gives another person poison, for the purpose of being swallowed by him, and the poison is swallowed by him and produces injury, the person negligently giving the poison is guilty of tort, and is liable for the injury, unless the injured person was also guilty of negligence which contributed to the injury. The principal question presented, and the only one which we deem it necessary specifically to determine, is one which arises upon an instruction given by the court on the subject of contributory negligence. The court gives the general rule in respect to the effect of contributory negligence on the part of the person injured, and so far there is no complaint by either party. But the court went further, and gave an exception to the rule, which may properly enough be given in some cases, but for which the defendants contended that there is in this case no warrant in the evidence. The exception given, stated in a general way, is the familiar one, that a plaintiff in an action for tort may recover, notwithstanding that his own negligence contributed to the injury, if the defendants, after seeing the danger of injury, did not use ordinary care to avoid it. Morris v. Chicago, &c. R. R. Co., 45 Iowa, 29; Weymire v. Wolfe, 52 Iowa, 533, 3 N. W. 541.

In determining whether the court erred in giving the instruction, we shall have occasion to notice the peculiar language used, and shall also have occasion to refer to the undisputed facts touching the question of negligence. The court instructed the jury that, if they found that the injuries complained of were contributed to by the plaintiff, he could not recover, unless it was further shown by him that his fault, or neglect, or carelessness, or wrong, was known to the defendants, and that the defendants could have prevented the injuries complained of by the exercise of reasonable care, after those facts had become known. The language used, it will be seen, is not clear. That the court intended to give the ordinary rule, as stated in the cases above cited, there is no doubt. But the use of the word 'wrong,' in the connection in which it was used, leads us to suspect that the court intended to add something to the ordinary rule. The idea to be expressed was the plaintiff's danger, or, what is the same thing under the circumstances, the plaintiff's *negligence producing danger*. If the court intended nothing more than that, the words 'fault or neglect or carelessness or wrong,' were not happily chosen. We have to say, therefore, that it rather appears to us that, in the use of the word 'wrong,' the court had in mind something that might be expressed by the word *trespass*, or possibly by the word *theft*. If so, then the court

intended to instruct the jury that if the plaintiff was guilty of trespass or theft, and such trespass or theft became known to the defendants, and they did not, after such knowledge, use ordinary care to prevent the injury, they would be liable notwithstanding the plaintiff's negligence. But it will be seen at once that they might have discovered the plaintiff's wrong of that kind, without discovering that he was in any danger; and unless they discovered his danger, there is no ground for the exception to the rule in respect to the effect of the plaintiff's contributory negligence.

But in no view can the instruction be sustained. The plaintiff predicated his right to recover upon the theory that he took the drug with the defendants' consent, and by that he must stand or fall.

Proceeding, then, upon that theory, let us inquire what are the undisputed facts respecting the subject of negligence. Taking the evidence of consent, as showing what the plaintiff claims that it does, the facts are as follows: The plaintiff went to the jar of belladonna, and took out on the point of his knife what he thought was a dose of the extract of dandelion, and called the attention of one of the defendants to it, and asked if that was a proper dose, and thereupon the plaintiff took it. The jar, it appears, was properly labeled, and the plaintiff's negligence, if any, consisted in not discovering that the jar

contained belladonna. There is no pretense that he could not read. The only excuse for him was, so far as we can discover, that the defendant, whom he consulted in regard to the size of the dose, had just made the same mistake. He had just taken from that jar, as the plaintiff had seen, a portion of its contents, to fill an order for the extract of dandelion, given by the plaintiff, and was doing up the package when the plaintiff proceeded to help himself from the jar as above set forth. There is not the slightest evidence that the defendant discovered the plaintiff's danger. The jury, then, should have been instructed, without qualification, that, if the plaintiff was guilty of negligence contributing to the injury, he cannot recover." "Reversed."

One of the judges filed a dissenting opinion in this case. He argued, first, that "the defendants were bound to know the contents of the jar, and its nature and character; the plaintiff, in the exercise of the highest care, was justified in relying upon defendants' knowledge of the contents of the jar, and upon their act, in taking a part of it, as a representation that it was the medicine he ordered." He maintains that, under the conditions stated, the plaintiff was not chargeable with contributory negligence. In his second argument, this judge holds that, conceding that the plaintiff was negligent, the liability for the injury would still rest upon the defendants.

If the plaintiff's act in helping himself to the belladonna had been in the usual course of business, that is, if that had been the usual way of dispensing drugs; or, if it had appeared from the evidence that the defendants actually saw the danger of injury and did not use ordinary care to prevent it, the opinion of the dissenting judge would seem to be right; but, as the case stands, we think that the judgment of the court is sound.

## CHAPTER XIV.

### SPECIAL FEATURES, CIVIL AND CRIMINAL.

The liability of the pharmacist is dual in its nature, and he may be subjected to both a civil action and a criminal prosecution for the same act. For instance, in compounding a prescription, if he uses a poisonous drug in place of an innocent one prescribed by the physician, as belladonna instead of the extract of dandelion, and the death of the patient is caused thereby, two separate actions may be commenced against him. He may be sued civilly to recover damages, and at the same time prosecuted criminally on a charge of manslaughter.[1] A judgment recovered against him on the civil suit will not interfere with his conviction for the crime. Thus, for the one act, he may be deprived of both his property and his liberty. Moreover, if he is practicing without a license, he is guilty of a misdemeanor under our statutes and is liable to a criminal prosecution for each act of that kind.[2]

The pharmacist is not to be held responsible for any unintentional, consequential injury that may result from his lawful act where it does not appear that he is chargeable with negligence or folly. In a New York case, Allen, a passenger,

[1] Tessymond's Case, 1 Lewin's Crown Cas. 169.

[2] People v. Rontey, 21 N. Y. St. R. 174, 4 N. Y. Supp. 235, 117 N. Y. 624, 22 N. E. 1128.

undertook to recover damages from a steamship company, for a mistake in filling a prescription on board one of its ships during a voyage. He was given calomel instead of quinine, but no actual negligence was shown. The court held that "a person is not legally responsible for any unintentional injury from a lawful act when the failure to exercise due care cannot be imputed to him. And the burden of proving such lack of care, where the act is lawful, is upon the plaintiff."[1]

Our statutes require the pharmacist to label the poisons which he sells, and a failure to do so is made a misdemeanor, punishable by fine, etc. This is simply his punishment for the crime of violating the law, regardless of whether or not any injury results from his negligence. Where injury does result, he is liable to a civil suit for damages; and, in case of death, he may be subjected to a second criminal prosecution on a charge of manslaughter. If, however, it appears that he fully and fairly warned the purchaser as to the dangerous character of the drug, and no negligence is proven, then he would be relieved from responsibility as to resulting injury. An action was commenced by Mary Wohlfart against Charles A. Beckert, a druggist, to recover damages for death caused by alleged negligence.

1 Allen v. State S. S. Co., 132 N. Y. 95; Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Carpenter v. Blake, 75 N. Y. 12; Morris v. Platt, 32 Conn. 75; Simonds v. Henry, 39 Me. 156.

It seems that Beckert's clerk had sold the plaintiff's deceased husband a poison without affixing thereto the label required by statute. The evidence showed that the clerk had informed the man that the "black drops" for which he asked was a strong poison, and that he should take only ten or twelve drops for a dose. It appears, however, that the deceased had taken many times the amount named by the clerk, having been informed by a friend that he had taken half a glass of "black draught" and was cured by it. The absence of the label was admitted.

The court held that though selling the poison without a label was a misdemeanor, yet the fact that the clerk had fully and fairly warned the purchaser of the dangerous character of the drug relieved the defendant from liability in a civil action.[1]

The pharmacist sometimes finds himself in the embarrassing position of being required to fill a prescription which he knows contains an overdose of some poisonous drug. His professional knowledge convinces him that the preparation will be dangerous, and, perhaps, even deadly. His first duty in such a situation is to call the attention of the prescribing physician to the fact of the error, if possible, and give him an opportunity to correct it. If it is impossible to communicate with the physician, or if the latter refuses to mod-

[1] Wohlfahrt v. Beckert, 12 Abb. N. C. 478.

ify the formula and insists upon its being compounded as it stands, the pharmacist must decline to do it; for if he dispenses the drug under those conditions and the patient is injured thereby, both pharmacist and physician are liable. A case of this kind is recorded in the State of Massachusetts, where a joint action was sustained against the physician who wrote the prescription and the druggist who compounded it.[1]

In a Pennsylvania case of the same kind, Judge Brewster said: "If the exercise of reasonable care would have warned him that he was preparing something which would inevitably kill, it would be criminal for him to go on."[2]

In cases of this kind, however, the plaintiff must prove affirmatively that there has been negligence on the part of the pharmacist; it is not sufficient to infer it.

Negligence is said to be the doing of something which a reasonable and prudent man would not do, or the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do. Each case presents its own peculiar facts and conditions, all of which must be taken into consideration in determining the question of negligence.

If a druggist sells an article that is harmless when used alone, but becomes dangerous when

[1] Hilliard on Torts, page 297, note a.

[2] Commonwealth v. Baur, Phila., Oyer and Terminer, April 1869.

combined with certain others, and is not aware that it is to be so combined, he is not to be held liable for any damage resulting from the combination.[1]

In a Georgia case the court decided that where, in good faith, a druggist recommends a prescription as that of another named person, and fills the same in compliance with the request of his customer, charging only for the medicines and his services in compounding them, he is not liable for any damage which may result from the use of the remedy. In this case it was held, also, that to fill a prescription is "to furnish, prepare and combine the requisite materials in due proportion as prescribed," and that the term "prescription" is broad enough to include a recipe or formula for the treatment of horses, whether it is furnished by a physician or by some other person.[2]

The courts of each State interpret its statutes, and determine what things may or may not be sold by one who is not a licensed pharmacist. In an Illinois case it was decided that the term "usual remedies," as employed in the statute, did not include quinine.[3] In a Minnesota case it was held that the sale of borax was not prohibited.[4]

In Brown v. Marshall, 47 Mich., 576, 41 Am. Rep. 728, 11 N. W. 392, the court holds that

[1] Davidson v. Nichols, 11 Allen (Mass.), 514.
[2] Ray v. Burbank, 61 Ga. 505, 34 Am. Rep. 103.
[3] Cook v. People, 125 Ill. 278, 17 N. E. 849.
[4] State v. Donaldson, 41 Minn. 74, 42 N. W. 781.

where a druggist has incorrectly filled a prescription he is not permitted to offer as a defense the fact that the case itself was negligently treated.

An action was prosecuted by Julia Norton, administratrix, against David J. Sewell, an apothecary, to recover damages for causing the death of the plaintiff's husband. The question of privity of contract and the survival of the right of action are considered in this case.

"At the trial in the superior court, before Reed, J., the evidence tended to show that Thomas Norton was in the employment of Patten, and on Aug. 19th, 1869, was sick with a cold at Patten's shop; that Patten told him to go home and said that he would get some medicine and come to his house in the evening and doctor him; that Patten in the evening of that day went to the shop of defendant, who was an apothecary, and asked for two ounces of rhubarb, and an attendant there gave him, by mistake, laudanum instead of rhubarb; that he procured the medicine to administer to Norton; and that he proceeded with it to Norton's house and there administered about an ounce of the laudanum to him, from the effects of which he died in five or six hours.

The defendant asked for a ruling 'this was a right of action which did not survive to an administrator.' But the judge declined so to rule; and also refused a request of the defendant for a ruling 'that there was no privity of contract be-

tween the defendant and the deceased, and therefore the action could not be maintained.' The jury found for the plaintiff, with damages in the sum of $450.00; and the defendant alleged exceptions."

On appeal, Justice Gray delivered the following opinion: "Upon the allegations in the declaration, and the statements in the bill of exceptions, the jury must be taken to have found that the defendant, an apothecary, by his servant, negligently sold, as and for tincture of rhubarb (a well known and harmless medicine) two ounces of laudanum, a dangerous and deadly poison, to Patten, who procured it for the purpose of administering it, and did administer one ounce of it, as a medicine, to his servant, the plaintiff's intestate, from the effects of which he died. This finding includes a violation of duty on the part of the defendant, and an injury resulting therefrom to the intestate, for which the defendant was responsible, without regard to the question of privity of contract between them. The case is within that of Thomas v. Winchester, 2 Selden, 6 N. Y., 397, 57 Am. Dec. 455 and Notes, which has often been recognized and approved by this court. Davidson v. Nichols, 11 Allen, 514, 519. McDonald v. Snelling, 14 Allen, 290, 295, 92 Am. Dec. 768 and Notes. Wellington v. Downer Kerosene Oil Co., 104 Mass., 64."

"By the statutes of the Commonwealth, 'actions of tort for assault, battery, imprisonment, or other damage to the person,' survive and may be prosecuted by the executor or administrator of the party injured. Gen. Sts., C. 127, I; C. 128, 1. The words 'damage to the person,' as here used, do not, indeed, extend to torts not directly affecting the person, but only the feelings or reputation, such as breach of promise, slander, or malicious prosecution. Smith v. Sherman, 4 Cush., 408; Nettleton v. Dinehart, 5 Cush., 543. But they do include every action, the substantial cause of which is a bodily injury, or, in the words of Chief Justice Shaw in 4 Cush., 413, 'damage of a physical character,' etc."

The Penal Code of each state should be consulted for special statutory provisions bearing upon the criminal liability of the pharmacist. Careful attention should be given to the sections dealing with the administering of drugs or the using of instruments to produce miscarriage; the administering of any poison or other destructive or noxious thing, so as to endanger life; the administering of drugs or medicines to make possible the commission of any crime; the administering of poisoned drugs, wrongly and with injurious effect, by a physician while intoxicated; the manufacturing or selling of drugs or instruments for unlawful purposes; also, the section declaring who is a principal in the commission of a crime.

## CHAPTER XV.

### Important Business Features.

The legal status of the physician's prescription, as to its ownership, has not yet been settled by the courts in this country. The legal rights of the physician himself in his own prescription, in the absence of statutory provisions, are, doubtless, those of the author of any writing under the principles of common law copyright.[1]

Under the common law the author is protected in his exclusive right to first print and publish his writings; and he may set in motion the power of the courts, by means of injunction, to restrain another from publishing them without his consent.

With regard to his prescription, the physician occupies the place of author, and undoubtedly should be protected from any unwarranted use or publication of his work by another. The publication of recipes for medicines and secrets for the compounding of medicines has been enjoined.[2]

This principle has been maintained with regard to letters, lectures, etc.[3] It has also been applied

[1] Donaldson v. Beckett, 4 Burr 2408; Wheaton v. Peters, 8 Pet. 591, 8 L. Ed. 1055, 3 U. S. Notes 482; French v. Maguire, 55 How. Pr. 471; Grigsby v. Breckenridge, 2 Bush 480, 92 Am. Dec. 509; Bullinger v. Mackey, 15 Blatchf. 550, Fed. Cas. No. 2127.

[2] Yovatt v. Winyard, I. J. & W. 394; Morison v. Moat, 9 Hare 241.

[3] Abernethy v. Hutchinson, 3 L. J., Ch. 209, 1 H. & T. 28; Gee v. Pritchard, 2 Swans 402, 19 R. R. 487.

to communications between professional men and their patrons; and, in general, the right of a man to keep or publish his own ideas has been strongly maintained by the courts.[1]

When an author publishes his writings, he is held to hereby relinquish his private or exclusive rights therein and they become public property. His only way to secure to himself the continued, exclusive control of his writings, after publication, is to avail himself, before publication, of the statutory provisions framed to that end.

Of course the physician does not ordinarily secure a statutory copyright on his prescriptions. Such a course would be impracticable. He must look for protection to the common law principles just referred to.

The fact that a prescription has been furnished to a patient is not such a publication of it as will serve to deprive a physician of his rights therein. Prescribing for a patient is not a general publication of the formula used; it is furnished to the patient for a specific use or purpose, undoubtedly limited, the nature of which is understood, presumably, by both him who furnishes it and him who receives it. This view of the subject seems reasonable, and it is in accordance with the judicial rulings in cases most nearly allied to that under consideration. Proceeding on academic lines, in the absence of decisions, it seems fair to

[1] Mills v. Taylor, 4 Burr 2362.

hold that the patient buys only this specific use of the remedy, and that his rights in the formula employed are limited to that use. He owns the paper on which the formula is written, but does not own the idea embraced in the writing and the author of it may forbid its refilling. The physician still owns the exclusive right to sell the prescription to other patients; as, under copyright by statute, the buyer of a book owns the individual copy purchased by him, while the author still owns the ideas or thought as expressed in the book, with the exclusive right to sell other copies.

The protection of this principle would not extend to formulæ or remedies that have been already published. They belong to the public, and the use of such by a physician in his prescription does not serve to give to him any exclusive right therein.

Having once been filled the life of the prescription is ended. It is *functus officio*. Its chief importance beyond this point is in its use as evidence of its own nature, in case mistake be charged against either physician or pharmacist. For this reason it is made the pharmacist's duty, by statute, to file and preserve the prescription for a certain number of years.

The "patent medicine" feature of the pharmacist's business has assumed considerable commercial importance in this age. So inviting and almost limitless is the field for proprietary medi-

cines that nearly every dealer in drugs is tempted, at some time, to experiment along that line on his own account. His exclusive right to manufacture and sell his particular compound is protected by registering the trade-mark. This is a protection afforded by the State government. If the article for which protection is desired is to be used in commerce with foreign nations, the several States of the Union, or the Indian tribes, the trade-mark may be registered in the Patent-office of the United States, and thus federal protection is secured.[1]

Trade-mark is defined as "A mark by which one's wares are known in trade."[2] "A word, mark, or device adopted by a manufacturer or vendor to distinguish his production from other productions of the same article."[3]

A trade-mark may consist of figures, letters or words arbitrarily chosen, or of some peculiar device; or, it may be formed by some peculiar arrangement of figures, letters or words, etc. "But letters or figures, which indicate quality merely, and which cannot indicate, by their own meaning or by association, origin or ownership, may not be appropriated."[4] It was held that the term

[1] Trade-mark Cases, 100 U. S. 82, 92, 99; 25 L. Ed. 550, 9 U. S. Notes 792 (1879).

[2] Shaw Stocking Co. v. Mack, 12 Fed. 710, 21 Blatchf. 1 (1882); Humphrey's Specific Homeopathic Medicine Co. v. Wenz, 14 Fed. 252; Adams v. Heisel, 31 Fed. 280.

[3] Hostetter v. Fries, 17 Fed. R. 622, 21 Blatchf. 339 (1883).

[4] Anderson's Dictionary of Law, page 1074.

"syrup of figs" could not be protected as a trade-mark. It expresses only the natural quality or character of the syrup, and any one must be permitted to make syrup from figs. To meet this objection the proprietors testified that it was an arbitrary use of the term, and that their compound did not, in fact, contain any product of figs whatever. From this evidence the court held that it was in the nature of a fraud upon the public, and for that reason this name could not be protected as a trade-mark.[1]

The druggist and, indeed, every other citizen should be acquainted with a few of the simple legal rules that are of daily application in his business. While it would be foolish and in the end expensive for him to attempt to be his own lawyer, yet there are matters familiar and of daily occurrence, the legal aspects of which he must understand, or be exposed to frequent losses before he is aware that he needs a lawyer. It is so unsatisfactory in a business transaction to find that one has sought legal advice a little too late to be benefited thereby.

One matter of prime importance to every business man who extends credit, is the preservation of his accounts from being barred by the statute of limitations; or, in familiar language, from becoming "outlawed." The different States, respectively, have their statutory limitations of

[1] California Fig Syrup Co. v. Frederick Stearns & Co., 73 Fed. Rep. 812, 43 U. S. App. 234, 20 C. C. A. 56.

time within which certain actions must be commenced. These are wise provisions against the raking up of old claims after, perhaps, important witnesses for the defense are dead and documentary and other evidence lost and destroyed. They serve as a stimulus to every dealer to keep his affairs well in hand and up to date; and upon engaging in business he must not fail to inform himself as to the rules adopted by his own State relating to this important subject. Thus fortified he is prepared to protect his accounts. For instance, in the State of California, "An action upon a contract, obligation, or liability, not founded upon an instrument of writing, or founded upon an instrument of writing executed out of the State," must be commenced within two years from the date upon which it was made or arose. Also, "An action upon any contract, obligation, or liability, founded upon an instrument in writing executed in this State" must be commenced within four years. In an ordinary, personal account for goods sold, each item charged has a life of two years from its date of sale; but in the case of a "mutual, open and current account where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proven in the account on either side." The balance owing on such an account will have a life of two years from the sale of the last item, and suit must be commenced within that time.

In the case of a promissory note, which is an "instrument in writing," the complaint must be filed within four years from the day upon which the note is payable or mature. That is, if a note is made payable one year after date, then suit must be commenced within five years from date.

In the process of protecting an account in California until a time when a debtor may be able or be compelled to pay it, before the expiration of two years a note should be secured; this preserves it for at least four years longer, then, unless a new note be given, suit must be commenced, after which another year or more may elapse during the pendency of the action before judgment; the judgment is effective for five years and at the end of that time may be renewed.

Many losses have occurred through ignorance of the fact that a promise to answer for the "debt, default, or miscarriage of another" must be in writing. It is not unusual for a man of financial responsibility to verbally endorse the credit of another, and say that he will stand good for any account which that other may run. It is easy and graceful, but it is wholly ineffectual, from a legal point of view, so far as concerns the protection of the creditor. Such a guaranty cannot be enforced; and even if the guarantor, with a fitting sense of honor, would desire to pay the claim, should he chance to be insolvent his other and legal creditors would object.

In such a case, in order to be secure, the dealer may refuse to extend the credit asked for, may demand a written promise from the would-be guarantor, or may agree to charge the goods thus sold, to the account of the guarantor, himself. If the latter course be agreed to, he must not open an account with the person for whose benefit the goods are furnished, nor may he ever make a demand upon him for payment; he must be consistent in his contention that he relied wholly upon the guarantor, otherwise the latter will be held free from all legal obligation to pay the claim.

Some of the other important cases in which contracts are invalid at law, unless there be some memorandum of them in writing signed by the party to be charged, are mentioned in Chapter VIII of this book, under the title "Explanatory of Contracts;" but the scope of this work does not require their discussion in detail.

## CHAPTER XVI.

### INSURANCE ON DRUGS.

The almost desperate means sometimes resorted to by insurance companies, in their efforts to avoid liability under their contracts, have been fully equaled, if not surpassed, by the efforts of parties insured to enforce unjust claims against them. These contests have, in many cases, developed conditions and legal questions in the last degree complex and vexatious.

The question as to what extent or under what conditions the keeping of an article by the party insured, expressly prohibited by the terms of the policy, will invalidate such policy and prevent a recovery in case of loss is one of considerable importance to druggists.

An action was brought in the Halifax, N. C. Superior Court to recover under a fire insurance policy issued by the defendant company, on plaintiff's stock of drugs and medicines, which was afterwards destroyed by fire. The judgment was in favor of the plaintiff, and the defendant appealed therefrom.

In the opinion in this case, affirming the judgment of the lower court, the Appellate Court said: "It appears that while the plaintiff's principal business was that of a druggist, yet, as is common with druggists in small towns, he kept various other articles. Nearly one half of his stock

was other than drugs and medicines strictly speaking, but in common parlance it would be called a stock of drugs and medicines. After the fire this seems to have been the first trouble—the plaintiff supposing that his stock in the store was insured, while the defendants insisted that only the 'drugs and medicines' were insured. And such is the language of the policy.

"What then are 'drugs and medicines?' This is not easily answered. Webster defines drugs to be 'substances used in the composition of medicines;' and again, 'used in dyeing or chemical operations.'

"It is clear that the defendant in the careful preparation of the policy ought not to have left a matter of that sort at large as a trap in which the plaintiff might be caught. This matter is, however, brought forward for the following specific purposes: 1. The policy, even by the defendant's admission, does insure the plaintiff's 'stock of drugs and medicines in the house,' &c. Well, is saltpeter a drug? Yes, it is admitted to be. Was it a part of the stock as a drug? Yes, admitted to have been. Then it was specifically insured in the written and governing part of the policy. But in the *small* print of the policy it is provided that if the 'assured shall keep gun powder, fireworks, nitroglycerine, phosphorous, saltpetre, &c., the policy shall be void.'

"Now the above articles are not necessarily drugs and medicines. The prohibition therefore is not against keeping them as drugs and medicines where a pound of saltpetre would be as harmless as a pound of alum, but against keeping them as articles of danger. With this construction the policy contract is just and reasonable; otherwise the policy insures saltpetre, and yet forbids the keeping of it. There is no allegation that it was kept otherwise than as a drug, and no objection is made to the quantity, and no pretense that any harm resulted from it. If the president of the defendant company had written after the fire as he did before, that his company would not insist upon technicalities or take advantage of inadvertences where no harm had resulted, it would have been doing gracefully what the courts will compel to be done, whether or no. A substantial compliance with a contract is all that is required in any case. Where there has been a substantial compliance and good faith, technicalities will be disregarded by the courts. The saltpetre which was in stock as a drug, kept and sold as a drug, was insured; it was forbidden to be kept or used otherwise than as a drug, and in such manner, or quantity, or for such purpose as would increase the risk.

"Wood on Insurance, page 840, is express authority for what I have said. 'Where a policy is issued upon a stock of goods, such as are usually

kept in a country store, it is held that all such goods as usually form a part of such a stock may be kept, although prohibited to be kept by the printed terms of the policy. * * * * * And when a policy covers a stock of merchandise which is in fact kept in a country store, although the words, *such as are usually kept in a country store,* are not used, the policy will not be invalidated by the keeping of articles embraced under the list of hazards, if the articles so kept are *usually* kept in such a store, although in the printed provisions of such policy, the keeping of such articles is specially prohibited.'

"In our case saltpetre was on hand as a part of the stock of drugs at the time the policy issued; it is usually kept in drug stores, and it was always kept on hand in small quantities for retail as a drug; the stock of drugs was insured; and although it was specially prohibited in the printed terms, it does not avoid the policy according to authority just quoted, for which he cites a number of cases. * * *"[1]

It appears from this case that when a policy is drawn to cover a "stock of drugs and medicines in the house, &c.," whatever is properly included within the limits of that description, so written in, is covered by the policy; notwithstanding the fact that the given article is included in a list, set out in the printed part of the policy, speci-

[1] Collins v. Farmville Insurance and Banking Co., 79 N. C. 279, 28 Am. Rep. 322.

fying things which must not be kept by the insured, under a condition that a violation of that provision shall render the policy void.

In such cases not only is the given article, if kept and used only as a drug, covered by the policy, but it is held, also, that the keeping of that article merely as a drug and not in quantities sufficient to increase the risk shall not operate to render the policy void. This conclusion is based on the principle that the written part of the policy expressing most directly the intention of the contracting parties, must control the printed part of the document. Saltpetre was admitted to be a drug and all drugs contained in the house were clearly included in the description of the property to be insured.

Such questions should be avoided as far as possible by a more specific description, in the policy, of the property to be insured.

It may be well to state here that it is a vital principle in insurance law that the party seeking insurance shall act in the utmost good faith, and shall conceal nothing from the insurer that would tend to increase the risk assumed.

In the foregoing case it appears that the policy was drawn to cover only the *drugs* and *medicines* contained in the building, when nearly one-half of the stock of goods consisted of articles not included within those terms. This fact occasioned a serious loss to the plaintiff druggist,

and it is a point of some interest to owners of drug stores desiring to effect safe insurance on an entire stock of goods.

The case of Carrigan v. Lycoming Fire Ins. Co., 53 Vermont, page 418, 38 Am. Rep. 687, throws some light upon the force to be given to terms used in the policy in describing the goods intended to be insured.

In this case the policy was written for $1200.00 covering, as written in, "stock in trade, consisting principally of groceries, provisions, drugs and medicines, fancy goods, and such other merchandise as is usually kept in a country store, including wines and liquors, * * * if the assured shall keep gunpowder, * * * benzine, benzole, etc., * * * without written permission in this policy, then, and in every such case, this policy shall be void."

The stock of goods was burned and the insured sued the company for the amount of the policy. Judgment was rendered in favor of the defendant and the case was appealed.

In rendering its judgment the Appellate Court said: "The defense claimed that the contract, and the claim under it, embraced liquors kept for sale contrary to law, and the fixtures used in such illegal traffic, which was carried on by the plaintiff; and that by reason of such illegality the policy was null and void.

"We think that a contract directly insuring

liquors intended for illegal sale in violation of the law of the State is invalid. Such contracts are made in order to afford the assured protection in his illegal acts. Shaw, Ch. J., says: 'Where the direct purpose of a contract is to affect, advance or encourage acts in violation of law, it is void. But if the contract sought to be enforced is collateral and independent, though in some measure connected with acts done in violation of law, the contract is not void.' Boardman v. Merrimack Mutual Ins. Co., 8 Cush. 583. This principle has been applied to contracts of insurance against fire, by the courts of Massachusetts, in several recent cases. In Kelly v. Home Ins. Co., 97 Mass., 288, the policy was solely upon liquors and the casks containing them; and in Johnson and another v. Union M. & F. Ins. Co., and Lawrence v. National Fire Ins. Co., 127 Mass., 555, and notes on page 557, upon billiard and drinking saloons, unlicensed, kept in violation of law. At the time the policies in these cases were issued, it must have been apparent to the insurers that the object of the contracts was illegal, unless the insured were duly licensed; and the cases do not show that any information upon that subject was sought for; and the insured would have had no cause for complaint, in case of loss, if the defendants insisted upon the illegal nature of the business as a defense.

"The same subject has been under consideration in Michigan; and the Supreme Court of that State, in a case almost identical with this, held that the policy was valid, stating, that, to make the case analogous to those involving marine policies on unlawful voyages, and lottery insurances which have been uniformly held null, would require the policy to be in express terms insuring the party selling liquors against loss by fire or forfeiture."

## CHAPTER XVII.

### THE PHARMACIST IN COURT.

However averse the pharmacist may be to litigation, it is necessary, sometimes, for him to appear in court. It may be as plaintiff or defendant, or as an ordinary witness, an expert witness, or a juror. If he appears in the capacity of plaintiff or defendant, he will probably have his attorney with him, and will act under his advice.

If the pharmacist be subpoenaed as an ordinary witness, he must obey the subpoena, though in a civil suit he may demand the fees to which he is entitled for travel to and from the place designated, and also for one day's attendance while there. As an ordinary witness he is expected and permitted to testify only to such facts as are within his personal knowledge.

In the case of expert testimony, the conditions are different. In the determination of questions connected with any science, art or trade, or any department of learning or industry, requiring special training or scientific knowledge, the witness is not restricted to the statement of facts, but may express his opinion. Indeed, in many cases it is his opinion only that is wanted; and he may give it upon a case hypothetically stated, or upon a case in which the facts have been established.

Before a witness is permitted to give expert testimony, he must be examined as to his qualifications to give an opinion on the point in issue. To this end he may be subjected to a close examination and cross-examination; and it is for the court to decide as to his fitness to testify in the matter.

The expert witness is entitled to remuneration for his opinion, and the weight of authority is that he cannot be compelled to give his professional opinion without compensation. However, it is customary and proper for the witness, before the trial, to stipulate for a fair compensation with the party desiring his services.

Unless specially exempt by the statutes of his State, the pharmacist, like any other citizen, is liable to serve as a juror.

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